FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 366-367

BAY RIDGE OPERATING CO., INC.,
Petitioner,

v.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

HURON STEVEDORING CORP.,
Petitioner,

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

INTERNATIONAL LONGSHOREMENS ASSOCIATION,
Amicus Curiae.

LOUIS WALDMAN,
Counsel.

APPEAL PRINTING CO., INC., 109 CEDAR ST., NEW YORK, WO 2-0343

INDEX

Table of Cases Cited

Statutes Cited

Publications and Commentaries

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING CO., INC.,
Petitioner,

v.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP.,
Petitioner,

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Now comes the International Longshoremens Association (A.F.L.), by its attorney, and respectfully moves for leave to file the attached brief as *Amicus Curiae* in the above-entitled cause, in support of the petitioners' appeal from the decision of the United States Circuit Court of Appeals for the Second Circuit. As grounds for said motion, movant shows:

1. The International Longshoremens Association, hereinafter referred to as the I.L.A., an unincorporated association, is a labor union affiliated with the American Federation of Labor. It consists of some 500 locals in the ports of the United States and Canada, with a membership of approximately 80,000. Its membership in the Port of New York numbers approximately 30,000. The plaintiffs are longshoremen in the Port of New York and are members of the I.L.A. The I.L.A., through its affiliated locals, is the collective bargaining agency for its members. The I.L.A. has been negotiating and making collective bargaining agreements with employers governing the wages, and terms and conditions of employment of its members for more than 30 years. For this reason it has a vital interest in the subject matter of this case.

2. The petitioners, by the Solicitor General, have filed herein a petition that Writs of Certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, which reversed a judgment in favor of the defendants entered by the United States District Court for the Southern District of New York. This Court granted certiorari. The movant, the I.L.A., is desirous to support petitioners' appeal.

3. The Solicitor General, as counsel for the petitioners, has given his consent to the filing of this brief. Counsel for the plaintiffs-respondents herein, has refused his consent.

4. Special reasons in support of this motion are set out in the accompanying brief.

Respectfully submitted,

LOUIS WALDMAN,
Counsel for
International Longshoremens Association, A.F.L.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 366

BAY RIDGE OPERATING CO., INC.,
Petitioner,

v.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

No. 367

HURON STEVEDORING CORP.,
Petitioner,

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

BRIEF

The Interest of the International Longshoremens Association

The International Longshoremens Association (A.F.L.), hereinafter referred to as the I.L.A., supports petitioners' appeal herein, because under the decision of the court

below, the economic and social gains it has made for its membership as a whole over a period of 25 years would be seriously undermined. Its capacity to negotiate and reach agreements in good faith for the betterment of the general conditions of its members, including the fixing of wage scales and overtime rates—which in this industry are over and above and superior to the standards set by the Fair Labor Standards Act—would be destroyed. Elements of uncertainty would be introduced into the processes of collective bargaining. The promises of the parties solemnly entered into and relied upon in working out an industrial code for the industry, would no longer have that moral authority and economic predictability which is a basic and essential requirement for effective pursuit of the processes of collective bargaining.

The rates of pay agreed upon between the union and the employers in the Port of New York, as evidenced in written contracts going as far back as 1916, demonstrate the evolution of an industrial relationship between a strong well-organized labor union on the one hand and a strong well-organized group of employers on the other. The union vigorously pursuing a course calculated to improve the standards and conditions of employment of its members, and the organized employers acting, in their own interest, through the New York Shipping Association, have, through the years, built an efficient and prosperous industry capable of yielding a reasonable profit to the owners, and those ever higher levels of wages and working conditions which the union has demanded and secured over the years.

The union simultaneously negotiates agreements with the employers in New York for 8 general classifications of employees, in the Port of New York. The wage scales and

overtime rates fixed in the collective agreements for the Port of New York are followed and adopted in the collective agreements for the many ports in the Atlantic Coast District of the union, which embraces every port north of Cape Hatteras along the Atlantic seacoast. In addition, they are followed in many of the ports throughout the country outside of the Atlantic Coast District. The agreements negotiated in New York cover the following general classifications: General Cargo; Cargo Repairmen; Checkers; Clerking; Port Watchmen; General Maintenance Workers; General Mechanic and Miscellaneous Workers; Horse and Cattle Feeders, Grain Ceilers and Marine Carpenters. These 8 agreements take up 54 pages of small type in the booklet entitled "Agreements Negotiated by the New York Shipping Association with the International Longshoremens Association * * * Effective October 1, 1943," which forms a part of Defendants' Exhibit A. The agreement which was considered in the above-entitled cases was the General Cargo Agreement.

The basic scale of wages under the 1943 General Cargo Agreement, ranged from $1.25 per hour to $2.50 per hour, the limit that was permitted under the "Little Steel Formula." These were the straight time hourly rates. The overtime hourly rates provided for in the agreement ranged from $1.87½ to $3.75. The overtime hourly rates were fixed in this agreement, as indeed, in the collective agreements which preceded and followed it, at one and one-half times or 150 percent of the contract straight time hourly rate (except for negligible classifications where there was a very slight deviation upward or downward).

In 1916 the General Cargo Agreement provided for basic straight time hourly rates of $.40 and overtime rates for night work of $.60 per hour. The basic hourly rate for explosives was $.80 per hour.

Wage scales are of course not the be all and end all of a collective bargaining agreement. Like most collective agreements negotiated by strong unions, the 1943 agreement also contains items dealing with the health, comfort and convenience of the workers, items dealing with human rights on the job as against the arbitrary powers of management, and items concerning machinery for arbitration. The 1943 General Cargo Agreement covers 15½ pages of small print in the booklet referred to *supra*.

It contains a provision for the preferential shop.

It fixes basic working hours and provides not merely for a maximum working week, but for a maximum basic working day in the following language:

> "2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.
>
> "(b) Meal hours shall be from 6 A.M. to 7 A.M., from 12 Noon to 1 P.M., from 6 P.M. to 7 P.M., and from 12 midnight to 1 A.M.
>
> "No work shall be performed during meal hours, except on arrival or sailing days, or to complete discharging or loading a hatch within the meal hour or by mutual agreement between the parties hereto in the event of other emergencies."

It provides for legal holidays.

It then sets forth that

> "3. (a) Straight time rate shall be paid for any work performed from 8 A.M. to 12 Noon and from 1 P. M. to 5 P.M. Monday to Friday, inclusive, and from 8 A.M. to 12 Noon Saturday.

"(b) All other time, including meal hours and the legal holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

"(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until men are relieved."

The agreement then sets forth the wage scales for 8 types af cargo. For each of these 8 types, it provides a straight time hourly rate and an overtime hourly rate, which is 150 percent of the straight time hourly rate, except for the slight deviations already mentioned.

It will be observed, therefore, that the collective agreement provides for overtime pay, not merely for hours worked in excess of the basic working week, but for all time worked outside of certain specified daytime hours.

Provision is then made that the employer shall supply certain work necessities and for regular and convenient payment of wages.

"Shaping time", a mode of employment peculiar to the longshore industry, is regulated. In order to prevent, insofar as can be done, abuse of the "shape" as a form of hiring, the contract provides that under certain conditions a worker who is chosen at the "shape" must be paid a minimum of either 2 or 4 hours pay, as the case may be.

There is a provision for suitable shelter during bad weather.

Then follow almost two pages regulating the minimum number of men in gangs loading and discharging various types of cargo, with a provision for immediate ruling on any disputed cases that may arise under this clause.

As a protection to the health of the workers, there are provisions concerning the maximum weights which may be lifted with and without the use of machinery. Similarly the agreement requires that the employer furnish clean drinking water and adequate sanitary facilities to the men; prohibits the use of intoxicants; and makes provision against shirking or pilfering.

There is a pledge that neither party to the agreement will discriminate against members of the other party.

Elaborate provision is made for arbitration of all disputes which may arise under the agreement.

The agreement here so briefly outlined, reflects the aspirations of the membership of the I.L.A. through the years. The increase in wages between 1916 and the date of this agreement, is paralleled by a reduction in working hours. The 1916 agreement provides for a ten hour day, while this agreement provides for an 8 hour day. The 1916 agreement covers 1½ typewritten pages. This agreement covers 15 printed pages. Through the quarter of a century that passed between the writing of the 1916 and the 1943 agreements, the union was building up, through the collective agreements, a code of labor relations in the interest of its members. No separate part of that code stands by itself. No separate part of that code was negotiated and won by the union without reference to and relationship to the other parts. No part of that code so painfully built through the years, was granted by the employers without reference to and relation to the other parts. The developing character of the agreement through the years, its growing concern with matters in addition to wages, the extension of its protections over more and more aspects of the workers

employment, reflects the processes of collective bargaining at their best.

In these agreements, over the years, the union fixed the basic and regular rates of pay, and the overtime rates, and they were understood to be the regular rates of pay and the overtime rates of pay by the parties to the agreements. Here was no overtime arrangement forced upon the union and the employers by the Act; the collective strength of the workers exercised through the I.L.A. and its predecessor organizations, had won overtime compensation for them long before the F.L.S.A.

Overtime was fixed at time and one-half the regular rates. No intricate computation to arrive at the overtime was necessary. The rates were clearly set forth, and no member of the union has ever expected overtime on overtime. No employer has ever expected that there would be a demand for it.

The union, speaking for its entire membership, cannot allow some of its members to repudiate individually an agreement as to what constitutes regular and overtime rates to which they, together with their fellow workers jointly agreed through the orderly processes of collective bargaining over a long period of years. For the union to stand by idly when such repudiation is attempted, would be to destroy the very foundation of bona fide collective bargaining.

The basic rates here involved are far higher than those required by the Fair Labor Standards Act. Without collective bargaining these very plaintiffs—members of the I.L.A. (Record, p. 25)— who now seek overtime on overtime rates ranging up to $3.75 per hour during the period in suit might, like millions of other American workers,

still be working at the $.40 per hour minimum provided by the Act.

The present agreement between the I.L.A. and the New York Shipping Association expires by its terms in August, 1948. One need not be a prophet to expect that the employers will not be ready to renew an agreement which, if the decision of the court below should stand, will have the effect of causing them to pay overtime on overtime. Indeed when it became known in 1945 that such a suit as the one now in question would be filed, the employers insisted upon inserting in the agreement a provision for renegotiation in the event that the overtime arrangements in this industry should be construed by the courts in such a manner as to negate the intent of the parties. The union resisted such a clause, but finally was compelled, as a part of the price of securing agreement, to assent to its inclusion.

The members of the I.L.A. well know what disaster such renegotiation may bring to them and how greatly they can be harmed if the overtime provisions which they have fought for for so many years and which are so far superior to the requirements of the F.L.S.A. should be changed. (See testimony of Joseph P. Ryan, President of the I.L.A., Record, 167-197.)

The trial court fully appreciated the danger, stating, in its opinion:

> "It is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American history.

> "Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise genuine collective bargaining cannot live." (Record, 586)

The danger to the longshoremen is real—and immediate. The very foundations of free collective bargaining are threatened—and we cannot believe that it was the purpose of Congress that the F.L.S.A. should be construed so as to make it such a threat.

It is a matter of historical record that it was the labor movement, of which the I.L.A. is a part, which was the prime mover in securing, first by collective agreement, and then through the reinforcement of law, a floor under wages and a ceiling over hours. The Fair Labor Standards Act was finally passed by Congress as the result of a public opinion which demanded for the unorganized workers at least some of the gains which had been won by organized labor.

It is inconceivable that it was the intent of organized labor, in supporting such legislation, to have it supplant free collective bargaining, or that it was the purpose of Congress that the standards set by such legislation should supplant the superior standards previously set by collective bargaining.

Congress, in passing the Fair Labor Standards Act, had for its overall purpose advancement of the social and economic position of labor by setting a floor under wages and a ceiling on hours. But, surely, it never contemplated that the law should be so construed as to hurt labor.

In the longshore industry particularly would the workers be hurt by such a construction of the Act, because it would cut the groundwork from under those clauses of their agreements which were especially designed to meet the problems of their industry and to meet their problems as workers in that industry. For example, the longshore industry unfortunately does not provide steady employment for its workers. All too often it does not provide a full week of work. Under the agreements which the longshoremen have won for themselves, under the agreement which the plaintiffs ask this court to treat as though it were a conspiracy to evade the provisions of the F.L.S.A., a longshoreman working from 1 P.M. to 9 P.M. three days in the week for a total of 24 hours, will receive not 24 times the basic hourly rate of pay, but will receive instead 30 times the basic hourly rate of pay. Thus workers who find themselves, because of the peculiar conditions of the longshore industry, in the position of having to work 7 or 8 hours a day for a total of less than 40 hours a week, nevertheless secure overtime pay for a considerable portion of the hours they do work. As the trial court found: "There was 8.50 times as much contractual 'overtime' as there was overtime, measured by the number of hours in excess of 40 worked for one employer (Record, 607). It is this economic gain, among others, which is threatened.

The union, ever since its existence, and by written contract since 1916, has consistently fought to maintain payment of overtime for all work done outside of the specified regular daytime hours.

This type of overtime pay is not peculiar to the longshore industry: there are thousands of collective agreements in which premium overtime pay is provided for certain hours not because they are in excess of a given

number, but because they fall outside of certain specified hours of the day. In the longshore industry, however, the peculiar nature of the industry makes such a provision especially important, for in the longshore industry there is constant pressure on the employers to work around the clock.

To make it possible for its members to live normal lives like their fellow citizens, to work during the hours when other men work, to spend time with their families, the union has had to resist this pressure consistently. It has placed high penalty overtime rates on all hours outside the daytime hours, so as to make around the clock work too expensive for the employers, except in case of absolute need. This device has proved successful in concentrating longshore work during the regular daytime hours.

The trial court found, as a fact, that concentration of work during the basic working day was almost 8 times as great as during the other 16 hours of the day from 1932 to 1937. During the 10 months' period from passage of F.L.S.A. to shortly before the outbreak of the war, this concentration was 6 times as great. Even during the last full war year, when pressure of round the clock work was greatly increased, due to the need of getting ships out of the port as quickly as possible, concentration of work was 2.4 times as great during the daytime hours as during the other 16 hours of the day (Record, 608).

If the decision of the Circuit Court of Appeals should stand, this concentration of work during the daytime hours, for which the union has so long fought, would be menaced.

It must be recognized that it is difficult enough for a union, in negotiations with its employers, to secure for its members conditions which are an advance upon those which generally prevail in American industry, even where

its position on the merits is unassailable. It would be far more difficult for the union to secure such conditions when the employers can point to a law that piles a statutory penalty on a penalty for overtime already exacted by the workers.

The I.L.A. and its members should not be placed in the position of having to resist the employers' demand for a revision of the overtime provisions in the contract.

The Issue

The ultimate issue involved in these cases, is whether the "straight time" rates of pay for the basic working day as defined in the collective bargaining agreement between the New York Shipping Association and the I.L.A., are regular rates of pay within the meaning of the Fair Labor Standards Act.

During the period in suit, if a man worked 41 hours, 35 of them within the basic working day, and 6 hours outside the basic working day, his compensation was 35 times the straight time hourly rate plus six times the contractual overtime rate. Since the contractual overtime rate was one and one-half times the straight time rate, he was therefore paid 44 times the straight time hourly rate instead of 41½ times the straight time hourly rate required by the F.L.S.A. If a man worked 41 hours, all of them outside the basic working day, he was compensated for all 41 hours at the contractual overtime rate. Thus he received 61½ times the straight time rate per hour for the 41 hours that he worked.

The District Court in its opinion, held that "the collectively bargained agreement established a regular rate" (Record, 591) and concluded, that the "straight time"

hourly rates set forth in the collective bargaining agreements constituted the "regular rates" at which respondents were employed and that the employers had complied with the requirements of Section 7a of the Fair Labor Standards Act, except in certain minor respects, which are not in dispute (Record, 617).

The court below disagreed with the trial judge. While holding that his findings "are supported by the evidence", it reversed him, and set up a different "regular rate" of pay than the "straight time" rates provided in the contract.

History of Labor Organization in the Longshore Industry With Special Reference to the Development of Overtime

A brief history of the I.L.A. and its predecessor organizations will help to clarify the issue involved in these cases.

Local organizations among the longshoremen here and there precede the Civil War. In New Orleans the cotton screw men are reported to have had an organization as early as 1850 that included nearly all the white screw men in the port.[1]

In San Francisco there was a Riggers and Stevedore's Union as early as 1853.

The local organizations among longshoremen before the Civil War on the Atlantic Coast, were of an ephemeral character.[2]

Stronger local organization followed. In the middle 80's in the hey-day of the Knights of Labor, many of the

1. Herbert B. Northrup, "The New Orleans Longshoremen" *Political Science Quarterly*, Vol. LVII (Dec. 1942), p. 526.
2. Charles B. Barnes, *The Longshoremen*, pp. 93-95. (This book was published in 1915.)

longshoremen in the North Atlantic Ports joined that organization. In New York, the loss of a long strike in 1887 led to the decline of the Knights of Labor and indeed of all organization among the longshoremen in that port.[3] In Boston assemblies of the Knights of Labor were the most important organized group of longshoremen down to 1912.[4]

It was not until 1914 that there could be said to be a real national organization of longshoremen. This was the International Longshoremen's Association, affiliated with the A. F. of L., which has remained the all-embracing union in the industry since that time, except on a part of the Pacific Coast. There a dual, rival union, going under the name of the International Longshoremen's and Warehousemen's Union, headed by one Harry Bridges, was set up about 12 years ago. This union, in the view of the I.L.A., is Communist dominated. Ever since it was founded, it has sought to make inroads on the I.L.A., in the port of New York, as well as in other areas where the I.L.A. is the sole union having collective bargaining agreements with the employers, covering the longshoremen.

The International Longshoremen's Association was founded in 1892. Originally it was named the Lumber Handlers of the Great Lakes. In 1893 it became affiliated with the American Federation of Labor as the National Longshoremen's Association of the United States, but shortly thereafter it adopted its present name.[5] In 1902 it changed its name to the International Longshoremen's

3. Bureau of Statistics of Labor of New York, *5th Annual Report: For the Year 1887*, pp. 327-385; Barnes, *op. cit.*, pp. 95-108.

4. *The Longshoreman*, Vol. IV, No. 3, (Apr. 1913), p. 1; Massachusetts State Board of Conciliation and Arbitration, *27th Annual Report*, 1912, pp. 13-16.

5. Lloyd G. Reynolds and Charles C. Killingsworth, *Trade Union Publications*, Vol. I, p. 95

Marine & Transport Workers Organization.[6] By 1909 the organization had resumed its former name, the International Longshoremens Association, which it still retains.

As early as 1872, the New York unions in the longshore industry were demanding extra rates for night work.

The day was then from 7 A.M. to 5 P.M. with an hour out for dinner. On sailing vessels very little night work was done.[7] It was the steamships that caused the pressure. The piers were small for the expanding traffic and the foremen were taking advantage of the fact that there was no penalty rate for night overtime to order more work at night, "when there were no teams to interfere. The men protested against this, and with a desire to cut out the excessive night and Sunday work, they demanded a high rate for these times. In 1872 this demand procured them an advance to 40 cents an hour for day work, 80 cents for night work and $1.00 for Sundays".[8]

These rates could not be held during the depression. After a strike they were lost and double time for the night hours and double time and one-half for Sunday went with them; the day rate was reduced to 30 cents.[9]

However, when organization revived, the men tried to get the double time back and succeeded on many piers by quitting at the end of the day unless the double time were paid.[10] In the 1887 strike, one of the demands was for double time for night work in order to eliminate night work during the hot weather.[11] The loss of the strike

6. *Proceedings*, I.L.A. 1902, pp. 152-160. The *Proceedings* from 1902 to 1908 are those of the I.L.M. & T.A., but they will be cited herein merely as *Proceedings*, I.L.A.
7. Barnes, *op. cit.*, p. 79.
8. Barnes, *op. cit.*, p. 77.
9. Barnes, *op. cit.*, pp. 77-78.
10. Barnes, *op. cit.*, p. 78.
11. Board of Mediation and Arbitration of New York, *First Annual Report*, 1887, p. 436.

ended double time. But the employers announced that they would pay 30 cents per hour for day and 45 cents per hour for night work.

Since that time the organized longshoremen have tenaciously held to the time and one-half rate for night work.

On the Atlantic Coast the rates in New York had settled down by the end of the century to 30 cents an hour for day work and 45 cents an hour for night or Sunday work.[12] In 1907 the longshoremen struck and demanded 40 cents for day work and 60 cents for night work and other overtime.[13] But the rates remained at 30 cents and 45 cents until 1912, when they were advanced to 33 cents an hour for day work and 50 cents an hour for night overtime. The day was 10 hours.[14] This advance in the day rate and the night overtime rate was announced by the employers after a demand for an increase had been made by the unions.

The I.L.A. began trying for an agreement for the Port of New York as early as 1910 at least. The District Council, Port of New York, I.L.A., in November of that year demanded of the employers that overtime should be counted from 7 P.M. till 12 midnight, and 1 A.M. to 6 A.M., and that all national, state and municipal holidays should also be counted as overtime.

The first signed agreement for the Port of New York was made in May, 1916. The day rate was set at 40 cents per hour; the night rate and the holiday rate (except Christmas and Fourth of July) at 60 cents and the rate for Sundays, Christmas and Fourth of July at 80 cents. In the 1917-18 agreement, the rates were

12. Barnes, *op. cit.* p. 111.
13. Barnes, *op. cit.*, p. 117.
14. *New York Times*, July 30, 1912; *U. S. Commission Industrial Relations*, Vol. III, pp. 2069, 2092, 2199, 2115, 2122.

advanced again to 50 cents, 75 cents and $1.00 with Labor Day added to the double time holidays. On the union's insistence, the day was reduced to 9 hours—the regular day ending at 5 P.M. and the hour from 5 to 6 P.M. being added to night work.

After the outbreak of the First World War, the National Adjustment Commission, hereinafter also referred to as the N.A.C., was set up in August, 1917, on the initiative of the United States Shipping Board "for the adjustment and control of wages, hours and conditions of labor in the loading and unloading of vessels." The original parties to the agreement, in addition to certain government agencies, were the I.L.A., the American Federation of Labor, and the principal shipping operators on the Atlantic and Gulf Coast.

In 1918, the National Adjustment Commission handed down a uniform wage for the Atlantic Coast Ports, effective October 1, 1918, in which it fixed a uniform scale of wages and hours, for both deep sea and coast wise longshoremen, "The basic working day" was reduced to 8 hours with Saturday a half holiday. A 9 hour day had prevailed not only in New York, but in Boston, and a 10 hour day in Baltimore and Hampton Roads District. The award did away with double time for Sundays and holidays—the men had asked for double pay for all overtime.

The regular hours were set at 8 A.M. to 12 noon and 1 to 5 P.M. on weekdays, exclusive of Saturdays. "All other time shall be counted and paid for at the rate of $1 per hour" (as contrasted with 65 cents for the regular hours).[15]

15. N.A.C., *Chairman's Report*, pp. 146-150.

With some interruptions during the depression years, the New York rates have climbed steadily since 1918 until they reached the straight time hourly rate of $1.25 and the overtime hourly rate of $1.87½ for general cargo that prevailed under the agreement in question in these cases. Rates for special types of cargo ranged as high as $2.50 per hour straight time, and $3.75 per hour overtime.

Specification of Errors to Be Urged

1. The court below erred in failing to find that the straight time rates of pay in the contracts involved herein are the regular rates of pay within the meaning of the F.L.S.A.

2. The court below erred in failing to hold that the overtime rates in the contracts herein involved were true overtime rates.

3. The court below erred in its application of the pertinent Supreme Court cases to the instant cases.

Summary of Argument

POINT I. The court below erred in failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, in which respondents and other longshoremen were employed during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7a of the F.L.S.A.

A. The basic working day of 8 daytime hours as set forth in the collective agreement was the regular working

day for the longshore industry, both by intention of the parties and in actual fact. It was therefore the regular working day for all longshoremen; and the hourly rate of pay—the contractual straight time rate—was the regular rate of pay for all longshoremen, including the respondents.

B. The provisions of the agreement measuring overtime by all hours worked outside of certain specified daytime hours were consonant with the purpose of Congress, and effectuated the purposes of the Act.

C. If the decision of the court below should stand, the intent of Congress would be frustrated.

D. As a matter of law, the I.L.A. and the employers had a right to contract for a regular rate so long as it was not less than the statutory minimum rate—and which in our cases was three times the statutory minimum rate—and an overtime rate so long as it was not less than the statutory 150 percent of the regular rate.

POINT II. The court below also erred in failing to hold that payment of one and one-half-times the "straight time" rates set forth in the collective bargaining agreements for all work performed outside the 40 basic hours—the "straight time hours"—in any work week in the period in suit satisfied the requirements of Section 7a of the F.L.S.A. with respect to payment of overtime compensation.

A. The contractual overtime rate was a true overtime rate by whatever test may be applied and therefore not the regular rate.

B. The contractual overtime rate was not a shift differential, as contended by respondents, and therefore there was no basis for holding it to be a regular rate.

C. The contemporaneous acts of the same negotiating committees which negotiated the General Cargo Agreement in deliberately providing different treatment where true shifts and not overtime was involved, show that the contractual overtime rate was a true overtime rate, and therefore not the regular rate.

POINT III. The court below further erred in its application to these cases of the pertinent decisions of the Supreme Court.

A. None of the cases relied on by the court below, have a substantial factual relationship to the instant cases.

B. The vices which the Supreme Court found in the overtime wage arrangements in the cases relied on by the court below are not present in the instant cases.

ARGUMENT

POINT I

The court below erred in failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, in which respondents and other longshoremen were employed during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7a of the F.L.S.A.

A. The basic working day of 8 daytime hours as set forth in the collective agreement was the regular working day for the longshore industry, both by intention of the parties and in actual fact. It was therefore the regular working day for all longshoremen; and the hourly rate of pay—the contractual straight time rate—was the regular rate of pay for all longshoremen, including the respondents.

The irregular character of work in the longshore industry has posed a constant challenge to the union to bring about as high a degree of regularity as possible. It has succeeded in doing so, by securing overtime compensation for hours worked outside the basic daytime hours, so that there is a high degree of concentration of work during the daytime hours.

The findings of fact of the trial court show how high a degree of concentration has been achieved. The trial court found that:

> "Statistical studies of 'straight time' and 'overtime' work in the Port of New York show:

> "(a) For the years 1932 to 1937, inclusive, the records of stevedoring companies, averaging six in number, in such years show that, on the average 79.93 per cent of the total number of hours worked were within the 'basic working day' as defined by the Collective Agreement. During the ten months between the effective date of the Fair Labor Standards Act, October 24, 1938 and August 31, 1939, shortly before the outbreak of the war, the corresponding percentage was 75.03 per cent, based upon a study of 17 stevedoring companies, together handling 70 per cent of the volume of work in the port." (Record, p. 606)

and

> "(d) During the last full year of war experience before V-E Day, namely the last three-quarters of 1944 and the first quarter of 1945, 54.5 per cent of total man hours fell within the 'basic working day' as defined by the Collective Agreement." (Record, 607)

Moreover, as already pointed out, the trial court also found, as a fact, that concentration of work during the basic working day was almost 8 times as great as during the other 16 hours of the day from 1932 to 1937. During the 10 months' period from passage of F.L.S.A. to shortly before the outbreak of the war, this concentration was 6 times as great. Even during the last full war year, when pressure of round the clock work was greatly increased, due to the need of getting ships out of the port as quickly as possible, concentration of work was 2.4 times as great during the daytime hours as during the other 16 hours of the day (Record, 608).

This concentration of work during the contract straight time hours was reflected in the regular hours of related industries and services. As the trial court also found:

> "Various employments which are intimately related to the handling of cargo are established on the basis of a working day of eight hours, from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M. This applies to the handling of cargo going off the pier by trucking companies and the clerical operations of steamship employees, painters, carpenters, cleaners and the like, and to Custom inspectors. The Collector of Customs at the Port of New York has determined hours, from 8 A.M. to 5 P.M. with one hour out for lunch, to be the normal working day for the loading and unloading of the vessels in the Port of New York. In the case of foreign shipments, work outside of those hours may be carried on only on a special permit issued by the Collector." (Record, 611, 612)

As the Supreme Court said in the case of *Walling* v. *Helmerich* and *Payne* (footnote), 323 U. S. 37, at page 40:

> "While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime work week."

The Standard Dictionary of the English Language, 1893 edition, defines "Regular" as

> "1. Made according to rule; formed after a uniform type, conforming to a consistent plan; symmetrical; normal;"

and defines "normal" as

> "1. According to an established law or principle; conformed to a type or standard, regular or natural, as in character, formation or action;"

and gives as synonyms common, natural, ordinary, regular, typical, usual.

In actual practice, the words "straight time pay", "basic rate of pay" and "regular rate" are interchangeably used. This is true not merely of workers who are not concerned with precise shades of distinction in the language they use, but of experts who are necessarily concerned with precision of meaning.

As an example, we cite a pamphlet containing rulings and interpretations on the Walsh-Healy Public Contracts Act (*49 Stat. 2036; U. S. C. 41, Secs. 35-45*), issued by Mr. L. Metcalf Walling, Administrator of the Wage and Hour and Public Contracts Divisions, United States Department of Labor. The citations herein are from a reprint of this pamphlet which appears in 2 C.C.H. Labor Law Service, 3rd Edition. Section 42 of this pamphlet headed "Overtime Compensation" contains the following language under Subdivision (d) Paragraph (1):

> "Whenever an employee works on a government contract subject to the Act for any part of a day in a given payroll or work week (after his employer has commenced and before the employer has completed work on the contract) he is entitled to be paid one and one-half times his *basic rate of pay* for all hours worked in excess of eight on that day * * *." C. C. H. page 35,418. (Emphasis supplied.)

Paragraph (4) contains the following language:

> "The Public Contract Act contemplates the payment of daily or weekly overtime compensation as extra compensation in addition to the *straight time* compensation for the non-overtime hours in the work week. In order to comply with the overtime requirements of the Act, therefore, an employer must pay an employee who works overtime both the amount legally due for the non-overtime hours worked in the week (normally computed at the em-

ployee's *basic rate*, where no deductions are involved), and compensation at one and one-half times the employee's *basic rate* of pay for the overtime hours worked. As noted in subsection (e) (9), below, the employees' *basic rate* of pay can in no event be less than the legal minimum." C. C. H. page 35,419 (Emphasis supplied.)

Under Paragraph (e) there appears the following language:

> "If the employee is compensated on a weekly salary basis, his *basic* or *regular* hourly rate of pay, on which time and one-half must be paid for overtime work, will be computed by dividing the salary by the regular number of hours worked to earn that salary . . . ." C. C. H. page 35,419. (Emphasis supplied.)

These are only a few of the cases where these words are used interchangeably.

Taken together, the facts cited above show that the regular or normal work day for longshore industry and its workers consisted of the daytime, contractual straight time hours.

And since the straight time hours were the regular, normal hours for the workers taken as a whole, they were, for the purposes of Section 7a, the regular, normal hours for the respondents, and the rates of pay for such regular, normal hours were the regular rates of pay of the respondents.

Any other conclusion requires that one of the fundamental purposes of collective bargaining, namely that it shall serve as an agency of industrial order, be ignored. The Encyclopedia of the Social Sciences, in the article on Collective Bargaining, states it thus (Vol. 3, p. 629):

"It is through the trade agreement, which is subsumed in the labor contract, that collective bargaining becomes an agency of industrial order. The trade agreement, which specifies how jobs and workmen are to be brought together in production, like a creed or a code, is of slow and tangled growth; the repetitious process of bargaining is the procedure by which the scheme of employment relations is built up and maintained. The general understanding is primarily concerned with wage rates; it is easily extended to the times and methods of wage payment, hours of labor, compensation for overtime, fines for infractions of rules, allowances for dead work, the protection of life and limb and hiring and firing. It may lay down the conditions of work in great detail, incorporate a code of working rules or specify technical practices, ways of handling materials, methods of checking results and standards of performance to test the competence of workmen. It gives nominal acceptance or even official sanction to customs, practices and procedures which have gradually grown up in a trade or industry. The constructive use of collective bargaining and the enforcement of trade agreements demand strong and continuing organizations and *the faithful performance of obligations on both sides.*" (Emphasis supplied.)

Where there is a scheme of industrial order covering 30,000 workers, that scheme embraces within its borders all of the workers, where, as here, they are included in the general scheme and there is no express provision for their exclusion. For if the "customs, practices and procedures" which are thought to govern all, are found instead to cover only a part, they will lose their force as to all, and even the part will suffer.

Collective bargaining, to be effective, must necessarily deal with large groups—with all the workers in the industry, or its subdivision, on whose behalf the bargaining is being conducted. And when, as in the I.L.A., such collective agreements are submitted to a vote of the membership affected, and that approval of the bargain thus arrived at is voted, it would make of collective bargaining a mockery if some of them could seek special terms, because, for a short period of time, their work experience has varied in some degree from that of their fellow workers. Under the terms of the collective agreements considered in our cases, *all* the workers benefited from the straight time rate. *All* the workers benefited from the fact that under certain conditions overtime rates were payable even before 40 hours had been worked. And *all* the workers were subject to the rare possibility—how rare is shown by the statistical data before the trial court—that they might sometime work more than 40 hours at night, and not receive overtime pyramided on overtime, where, as in our cases, they were already receiving time and one-half for the first 40 hours. They embraced that possibility in their contract because of the tremendous benefits they gained and those benefits of collective bargaining, and the order and stability it brings to employer and employee alike, should not be lightly thrown aside, with the very great risk, as has already been shown, that these benefits will be lost to *all* the workers, including the respondents here.

The regular rate for the entire New York longshore industry, for all of the workers and all of the employers in the industry, was the straight time hourly rate of the collective agreement.

As the Supreme Court stated in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, at pages 634, 635,

> "the problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable and that which it was unwise for Congress to do, this court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artifical interpretation of the Act * * *"

We respectfully submit that in the light of the facts in this case, it would require "an inflexible and artifical interpretation of The Act" to hold that the straight time daytime hours are not the regular hours within the meaning of the Act. The trial court was amply justified in finding that "'the straight time hourly rate' * * * constituted the regular rate at which plaintiffs were employed * * *" (Record, 617).

B. The provisions of the agreement measuring overtime by all hours worked outside of certain specified daytime hours were consonant with the purpose of Congress, and effectuated the purposes of the Act.

The Supreme Court has stated that the Act had a

> "dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long work week". *Walling* v. *Youngerman Reynolds Hardwood Company*, 325 U. S. 419, 423.

From the very beginning of American industrial history, organized labor fought for the shorter working day and its chief device toward that end was the establishment of a punitive rate—generally 150% of the regular rate—for overtime (Record, 328, 421, *et seq.*).

Congress did not, with the passage of the F.L.S.A, introduce a new concept into American industry, but adopted a concept which was already firmly rooted in the unionized trades, namely, that a premium of 50% for overtime work would act as a deterrent to working a long day or a long week and would compensate the employees for the burden of a long work week. The payment of premium overtime rates has been a prominent feature of trade union history for more than a century here and abroad. Sydney and Beatrice Webb, in their standard work on British Trade Unionism, *Industrial Democracy*, written in 1897, point to the fact that as early as 1836, the London engineers, after a successful strike, secured a 60 hour week and "the penalizing of overtime by extra rates" (p. 340). In a later passage, they state that the 1892 agreement for the building trades in London "with extra rates intended to penalize overtime, is only one of the latest of a practically unbroken series of collective agreements" (p. 341).

The Iron Molders Union, one of the oldest of American trade unions, adopted a rule at its 1876 National Convention, that 10 hours should be recognized as "a legal days' work", *the hours to be worked between 7 A.M. and 6 P.M.* (emphasis supplied), "with overtime 'in the same ratio as to all other mechanics' in the immediate vicinity".[16] In 1895 the overtime rate was made specifically

16. F. T. Stockton, *The International Molders Union*, p. 161.

time and one-half with double time for Sundays and holidays.[17]

The oldest of the American National Unions, is the Typographical Union. The late Professor George E. Barnett, one time President of the American Economic Association, in his standard work on this union, *The Printers*, published in 1909, stated: "The distinctive characteristic of regulations aimed at reducing the length of the working day * * * is the requirement * * * of a considerably higher rate for overtime than for 'time'" (p. 157).

After pointing out that the overtime rate varied in different localities, Professor Barnett wrote: "* * * As the eight hour day has been more fully established, the local unions have increased their overtime rates." In 1910 the overtime rate in the printing industry was ordinarily one and one-half times the straight time rate.[18]

In the Molders Union, Stockton states: "The international officers have always tried to discourage overtime because 'it takes work away from the unemployed' and because tired men cannot do good work".[19]

Barnett said of the Printers Union: "The aim of the union is to reduce the hours of work and not to get extra pay * * * although it cannot abolish such work entirely, it means to make overtime as undesirable to employers as trade conditions will permit."[20]

In *What's What in the Labor Movement*, compiled by Waldo R. Brown and published in 1921, we find (p. 363) the following under the heading "*Overtime*":

> "Time worked beyond the number of hours established by COLLECTIVE BARGAINING, by

17. Stockton, *op. cit.*, p. 167.
18. George E. Barnett, *The Printers*, pp. 157-158.
19. Stockton, *op. cit.*, p. 167.
20. Barnett, *op. cit.*, p. 159.

> custom, or by law as comprising the NORMAL DAY OR WEEK in a particular industry, occupation, or industrial plant, or time worked on Sundays and holidays, is so called. The increased rate of pay commonly demanded by organized employees for such extra working time is often known as 'punitive overtime', the trade union theory being that it is usually unnecessary and always undesirable to have overtime, and that the increased rate of payment is a penalty against the employer and intended to act as a deterrent."

As already stated, the American Molders Union thought it necessary in 1876 to support the ten hour day rule with a statement that the hours must be between 7 A.M. and 6 P.M. In 1895, an addition was made to the rule that work between twelve and one was to be avoided if practicable.[21]

As the Molders Rule of 1876, indicates, the hours outside those specified for the regular working time, are regarded as overtime and are to be paid for at higher rates.

We cite the Molders only because it was one of the earlier unions that was able to enforce overtime pay. It was neither the only union nor the first union; nor was it the only union which required payment outside certain hours specified as regular working time at an overtime rate. That has been common practice in many trades for varying lengths of time. One reason for this practice is that it simplifies enforcement of the overtime premium. For example, without such a provision, a worker and employer who might wish to avoid the payment of an overtime premium, could deceive th union by claiming that work

21. Stockton, *op. cit.*, pp. 161-167.

had been begun at, let us say, one o'clock in the afternoon and that work being done at eight o'clock in the evening, was therefore not overtime but part of the regular eight hour day. Obviously however, this problem of enforcement disappears where all hours outside of the specified regular working hours are considered overtime.

Another reason for the growth of the practice, has been a desire on the part of workers generally, to confine their work to the normal working hours of the neighborhood, community or trade and to render it difficult for employers to demand their services during hours which the bulk of the population normally spends at home or in the pursuits of leisure. It was this latter reason that was the motivating force in the longshoremen's demands for overtime premium pay outside the regular working hours (Testimony of Joseph P. Ryan, Record, p. 173).

In addition, there was a special motive in the case of the longshoremen, "to de-casualize longshore work as much as possible." (Testimony of Ryan, Record, p. 189).

Among the industries, where overtime rates must be paid for hours outside certain specified day time hours *as such*, "are the carpenters, steamfitters, sheet metal workers, painters, electrical workers, cement and asphalt workers, stereotypists, breweries, optical technicians, machinists, glaziers, boilermakers, automobile workers, printing pressmen, retail delivery drivers, boot and shoe workers, and leather workers, and furniture workers." (Testimony of Prof. Taft, Record, p. 339). Also, "the building trades, the metal trades * * * scattering other industries" (Testimony of Prof. McCabe, Record, p. 426).

It could not have been the purpose of Congress to supplant overtime arrangements already a part of the American industrial pattern, which also had as their

objective the imposition of a penalty premium of 50% on overtime as a deterrent to working a long day or a long week, but rather to introduce this means of controlling the long day or long week, where the penalty premium was not already in effect.

The report of the Senate Committee on Education and Labor on the Fair Labor Standards Act (S. 2475, 75th Cong. 1st Sess.), presented by Senator Black who had introduced the bill, says: (*Sen. Rep. 884,* 75th Cong., 1st Sess., pp. 3-4.)

> "It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment wherever there can be any real, genuine bargain between them. It is only those low wage and long-work-hour industrial workers who are helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." (See also, 81 *Cong. Rec.*, pp. 7650, 7808.)

And the report of the Committee on Labor to the House on this bill, as amended, says:

> "The bill is intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining." (*House Report No. 1452,* 75th Cong, 1st Sess., p. 9.)

And in speaking of the bill, as presented in the Special Session, the Chairman of the Committee, Representative Norton, said:

> "It is intended to protect employees who are not protected by collective bargaining agreements." (82 *Cong. Rec.*, p. 1990.)

Moreover, Congress must be presumed to have known that the unionized trades had, over a period of years, worked out overtime arrangements which were more favorable to the workers in them, than the 50 percent penalty premium on excessive hours—that for example some unionized trades imposed a penalty premium of 100 percent on overtime hours and that a number of the best organized trades imposed penalty premiums not merely for excessive hours but for hours outside of a regular or normal or basic working day. It could certainly not have been the purpose of Congress that the F.L.S.A. be so interpreted as to place additional statutory overtime penalties on industries which had already granted to their employees, as a result of union insistence, more favorable overtime provisions than the statute was to provide. The purpose of Congress was to limit the working day by imposition of a penalty premium of 50 percent for overtime. The trial court found as a fact, that in the Port of New York, "the 50 percent overriding charge for work done during 'overtime' hours, is a deterrent because of the added cost * * *" and that "the steamship companies in the Port of New York, have preferred to confine the handling of cargo to 'straight time hours' to the greatest possible extent" (Record, 603).

The trial court further found that "the objective of organized labor has been to shorten the total number of weekly hours * * *. A mechanism for accomplishing this result has frequently been to schedule an approved tour of daily hours to be compensated for at a straight time rate and to classify all other hours as overtime hours compensated at an overtime rate. The employment of the 50 percent premium for such overtime hours, was designed to constitute a deterrent and not a pro-

hibition. Such 50 percent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York to the basic working day" (Record, 612).

The trial court's findings of fact based on statistical studies introduced into evidence, would also indicate that the overtime device used in the longshore industry tends to reduce hours of work and to cause the employment of more men. For example, the court found that during the 10 month period from October 24, 1938, the effective date of the F.L.S.A., to August 31, 1939, shortly before the outbreak of the war, only 8.05% of the longshoremen who worked in the Port of New York, worked more than 40 hours a week for one employer. Similarly the trial court found that the percentage of total hours worked for one employer, which is represented by work in excess of 40 hours per week, was 2.94 percent (Record, 607). Similarly the court found that during the last full year of war experience before V.E. Day, 44.5 percent of total "overtime" man hours worked between 5 P.M. and 8 A.M. (exclusive of Sundays and holidays) was worked by men who had done no work previously during the straight time working day (Record, 607, 608).

All these figures lead irresistibly to the conclusion that the overtime device used in the longshore industry had the result of inducing the employers "to employ more men". Moreover, under the contract, the men were compensated for the burden of long hours at the statutory rate.

Thus the "dual purpose" of the Act has been achieved under the collective agreement in the Port of New York and the method of overtime compensation adopted in the

Port of New York is therefore in consonance with the purpose of Congress.

C. If the decision of the court below should stand, the intent of Congress would be frustrated.

As we understand the decision of the court below, it holds that the regular rate is to be determined by dividing the wages actually paid by the hours actually worked. Then, of course, overtime rates would be determined by taking 150% of the regular rates thus computed.

We base this reading of the decision of the court below on the following portions of the decision:

> "• • • But in Walling *v.* Halliburton Oil Well Cementing Co., —— U. S. — (April 14, 1947), the Court stated that 'in Overnight Motor Co. *v.* Missel, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked.' See also Ferren *v.* Waterman S. S. Co., supra; cf. Walling *v.* Scholl-horn, 54 F. Supp. 1022.
>
> "The Administrator's Press Release 1913 stated that theretofore, where an employee received more than one rate during a workweek, the Administrator had ruled that the employer must pay the employee an 'overtime rate of one and one-half his average hourly earnings for the entire week, computed by dividing the weekly earnings at both rates by the total number of hours worked in the week,' but that thereafter an employer would have an option, in the alternative, to compute the overtime rate at one and one-half times the rate at which the employee worked during the hours in excess of forty. However, this Release was later qualified by Press Release 1913 A, which stated, 'In order to take advantage of this (revised) rule, the records of the

> employer must show which method of computing overtime compensation he had determined to follow.' Nothing in the evidence here indicates that either defendants so kept its records." (Reported at 162 F. 2d at pp. 669-70.)

If our reading of the decision of the court below be correct, and the regular rate in our cases is to be determined not by the contract, but by dividing the wages actually paid by the hours actually worked, then the intent of Congress, that hours in excess of 40 should be compensated at one and one half times the regular rate, would be frustrated.

The F.L.S.A. by its terms indicates that the purpose of Congress was to impose an overtime rate as a deterrent to working excessive hours, the measure of non-excessive hours being first 44 then 42 and at the time of the acts complained of in these case, 40 hours per week.

The Congress set the penalty premium for overtime work at 50% of the regular rate. Congress did not intend that the penalty premium should constitute a prohibition, but merely a deterrent. Stated differently it is clear that the purpose of Congress was that where an employer, for whatever reason, felt the need for working more than 40 hours a week, he could do so upon the payment of 150% of the rate for the first 40 hours. But under the decision of the court below, there is no possible combination of circumstances in the longshore industry by which an employer operating in the day time hours during the first five days of the week, can work overtime on payment of one and one-half times the hourly rate paid for those day time hours.

For example, if we assume that an employer has worked his employees eight day time hours from Monday through

Friday, plus one additional hour on Friday, then under the decision of the court below, the employees' wage for the 41st hour would be 1.51 times their hourly rate for the first 40 hours.[22]

If he has worked nine hours each of the first five days of the week or five hours overtime then the employees rate per hour for the 41st to 45th hours will be 1.58 times the hourly rate for the first 40 hours.[23]

If he worked two hours overtime each day, or a total of 10 hours overtime, then the overtime rate for the 41st to the 50th hours would be 1.65 times the hourly rate for the first 40 hours.[24]

Thus instead of the employer paying 1.50 times the 40 hour rate after the first 40 hours, he will pay varying amounts ranging from 1.51 times the 40 hour rate for one hour of overtime to 1.58 times the 40 hour rate if he works 5 hours overtime to 1.68 times the hourly rate if he works 10 hours overtime, and higher with each additional hour of overtime work. To compel an employer to pay more than 150% of the rate for the first 40 hours, for overtime after 40 hours, is indeed to substitute the judgment of the courts for the clear mandate of Congress.

This result would not only fustrate the purposes of the Act, but would prevent the I.L.A. and other unions, from

22. The calculation is as follows (assuming a straight time rate of $1 per hour for ease of calculation): The "wages actually paid" are $40 for the first 40 hours plus $1.50 for the one hour overtime, or $41.50. The "hours actually worked" are 41. The regular rate is therefore $41.50 divided by 41 equals $1.01. The overtime rate is therefore one and one half times $1.01, or $1.51 per hour, or 151% of the straight time rate.

23. $40 for the first 40 hours plus $7.50 for the five overtime hours equals $47.50 "wages actually paid." $47.50 divided by 45 ("hours actually worked") equals $1.05 regular rate. The overtime rate is therefore $1.05 plus 53 cents, or $1.58 per hour, or 1.58 times the straight time rate.

24. $40 for the first 40 hours plus $15 for the 10 overtime hours equals $55 "wages actually paid." $55 divided by 50 ("hours actually worked") equals $1.10 regular rate. The overtime rate is therefore $1.10 plus 55 cents, or $1.65 per hour, or 1.65 times the straight time rate.

agreeing, in good faith to a regular rate and an overtime rate of 150% of the regular rate.

D. As a matter of law, the I.L.A. and the employers had a right to contract for a regular rate so long as it was not less than the statutory minimum rate—and which in our cases was three times the statutory minimum rate—and an overtime rate so long as it was not less than the statutory 150 percent of the regular rate.

Employer and employee may establish the regular rate by contract. *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 631. Public policy favors collective bargaining *National Labor Relations Act, 29 U. S. Code, Sec. 151. Labor Management Relations Act of 1947, 29 U. S. Code Sec. 151,* as amended by Act of June 23, 1947, Public Law 101, 80th Congress. It follows as a matter of public policy, therefore, that the employer represented by his trade association and the employee represented by his union, may establish the regular rate by contract.

Moreover, if, as held in the *Belo* case, employer and employee may fix the regular rate in individual bargaining, and if it be held that such was the intent of Congress, then *a fortiori* it must be held that the Congress intended that they may fix the rate by collective bargaining. For collective bargaining affords to the employees greater safeguards against oppression, and overreaching, than individual bargaining.

Congress has several times stated its belief in the superior protection afforded workers by collective bargaining. For example, in the National Labor Relations Act, Congress uses the following language, in the section on Findings and Policy:

> "Experience has proved that protection by law of the right of employees to organize and bargain

> collectively safeguards commerce * * * by restoring equality of bargaining power between employers and employees.''.

The same language is used in the Labor Management Relations Act of 1947. *29 U. S. Code Secs. 151-166, Act of June 23, 1947, Public Law 101, 80th Congress.*

Similar language is used in the Norris-La Guardia Act, as follows:

> "Whereas under prevailing economic conditions, developed with the aid of governmental authority for the owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment * * * wherefore * * * it is necessary that he have full freedom of association, self organization, * * * to negotiate the terms and conditions of his employment * * *". *29 U. S. Code, Secs. 101-115.*

And Congress in the F.L.S.A. itself not only indicated its belief that the unions have a protective function with respect to their members, but that it was willing to rely upon this function of the unions to help guard against evasions of the law in the field of exemptions. Thus, in Section 7b, which provides for certain exemptions from the overtime provisions of the Act, these exemptions apply not where individual contracts have been entered into by the employer and employee, but only where collective agreements with a bona fide union have been entered into.

POINT II

The court below also erred in failing to hold that payment of one and one-half-times the "straight time" rates set forth in the collective bargaining agreements for all work performed outside the 40 basic hours—the "straight time hours"—in any work week in the period in suit satisfied the requirements of Section 7a of the F.L.S.A. with respect to payment of overtime compensation.

A. The contractual overtime rate was a true overtime rate by whatever test may be applied and therefore not the regular rate.

As already pointed out, the contractual overtime rate had the effect of shortening the working day.

It was a punitive rate. As the Trial Court found, "stevedoring companies never worked any more 'overtime' than was necessary, because it was more economical for the steamship company and more profitable to the stevedores to work during 'straight time hours'" (Record, 602).

By the test of the parties' intention, it was a true overtime rate, for as the testimony shows, over a period of years, both the union and the employers in their negotiations and in their communications to their members, treated the night rate as an overtime rate (Record, 434, *et seq.*).

In this connection, it must be remembered that labor negotiations are usually carried on by laymen and not by lawyers and that their contracts are not always drawn with legalistic precision. But these laymen know what they are negotiating about and whether the terms they

use be precise or imprecise, they know what these terms mean.

In point of fact, the "night rate", the "hours outside the normal hours", the "hours outside the day-time hours" the "hours outside the basic working day"—whatever phrase one chooses to refer to the overtime hours, were referred to constantly as overtime, both in the negotiations between the parties, and, in one way or another, in all the Collective Agreements which put into written form the results of these negotiations.

The court below appears to have ignored this fact, and it seems to have drawn certain inferences, from the fact that in 1938 there was a change in the nomenclature used in the collective agreement, which we believe to be unwarranted by the record.

The court below noted:

> "The annual collective agreements made with this union since 1921 have provided for a 'basic working day' of eight hours and a 'basic working week' of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: (1) Specified hourly rates were set for 'work performed from 8 A.M. to 12 Noon and from 1 P.M. 5 P.M.; Monday to Friday inclusive, and from 8 A.M. to 12 Noon Saturday; (2) With a few exceptions, one and one-half times these rates, were fixed for what the agreements called 'all other time.' In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the agreement changed the labels for these respective periods: The first was now called 'straight time'; the second was now called 'overtime rates.' This nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits:

> No other significant changes were made in the agreements after the Act went into effect." Reported at 162 F. 2d 655, at p. 666.

This statement is correct in so far as it goes, but it neglects to make an important qualification—that a most cursory reading of these same agreements which are in evidence (Defendant's Exhibit A), will show that from 1919 to the date of the agreement in question, the word "overtime" is constantly used, as we shall show immediately below.

The trial court found as a fact that

> "The Collective Agreements did not employ the word 'overtime' for all hours outside the basic working day until 1938, but the use of the word 'overtime' occurs regularly in clauses relating to penalty cargo in all agreements commencing in 1918. Both the Union and the employers, during their negotiations, referred to such hours as 'overtime' ". (Record, p. 611)

That is to say, when the agreements spoke of overtime generally, they used the phrase which had been imported into the language of the agreements by the National Adjustment Commission in 1918. But when questions concerning payment to be made for specific types of cargo carrying higher rates were dealt with in the agreements, the phrase "all other time" was replaced by the word that was synonymous with it in the minds of the parties, namely "overtime."

The phrase "all other time" as a synonym for overtime can best be understood in the light of its historical background, and in the light of that background it is clear that the change in labels noted by the court below was merely a change which brought into accord with the

nomenclature of the F.L.S.A. the nomenclature of an overtime arrangement which already complied with, and was greatly superior to, the overtime compensation requirements of the Act.

As already pointed out, until 1918 there had been three different rates in the longshore industry. These were a straight time rate, a night time overtime rate of time and one-half, and a Sunday and meal time overtime rate of double time.

In 1918, the National Adjustment Commission handed down an award in which it fixed a uniform scale of wages and hours for the Atlantic Coast Ports. The basic working day which had been nine hours in New York and in Boston and 10 hours in Baltimore and the Hampton Roads District, was reduced to eight hours with Saturday a half holiday.

The men had asked for double pay for all overtime. The award not only did not grant double pay for all overtime, but did away with double time for Sundays and holidays.

The regular hours were set at 8 A.M. to 12 noon and 1 to 5 P.M. on week days, exclusive of Saturdays. "All other times shall be counted and paid for at the rate of $1.00 per hour" as contrasted with .65. The reason for this was, "it appeared that a tendency had developed in certain ports on the part of certain longshoremen to neglect regular work during the week in order to avail themselves of double time rates on Sundays and holidays and the wisdom of continuing three rates of pay was seriously questioned".[25] Meanwhile, at the Port of Baltimore, separate night shifts were permitted at the day

25. N.A.C., *Chairman's Report*, pp. 46-150.

rate.[26] This had been the practice in Baltimore for some time. That port was still poorly organized in 1917.[27]

This was the first time that the phrase "all other hours shall be counted and paid for at a fixed rate" was used in the agreements between the parties. This phrase was not of their own making, but was handed down in the National Adjustment Commission's award and the phrase itself was used because of a very special situation, the existence of two overtime rates which the National Adjustment Commission sought to eliminate in favor of one overtime rate.

However, all other time was just as much overtime as though the word "overtime" had been used. When a dispute arose concerning the rate to be paid for work during the meal hour, the Commission issued a supplementary award in which it established particular hours for meals "except where local practice or agreement has established different meal periods." It allowed the setting forward or back of the meal period of one hour, "in case of emergencies", but provided "that where this is done, *overtime rates* shall be paid for the work done during the regular meal period."[28] (Emphasis supplied.) (pp. 150-153.)

The Commission made a Gulf Deep Sea Longshore award on November 2, 1918. Here the 8 hour day was provided for at 65 cents "for regular time on all week days and all other time shall be accounted and paid for as *overtime* at the rate of $1.00 per hour."[29] (Emphasis supplied.)

In brief, as found by the trial court as a fact:

> "In the Award rendered in 1918 by the National Adjustment Commission, the hours outside of the

26. N.A.C., *Chairman's Report*, p. 147.
27. *Proceedings*, I.L.A., 1917, pp. 25, 112, 113.
28. N.A.C., *Chairman's Report*, pp. 150-153.
29. N.A.C., *Chairman's Report*, p. 98.

basic work day were labeled overtime." (Record, p. 611.)

Thus, from 1918 to 1938, the parties to the Collective Agreements used "all other time" and "overtime" interchangeably, and overtime continued to be overtime, with the same deterrent force on long hours, and the same reflection of the intent of the parties, as it had always had. And since the contractual overtime rate was a true overtime rate, it could not be the regular rate.

B. The contractual overtime rate was not a shift differential, as contended by respondents, and therefore there was no basis for holding it to be a regular rate.

The attempt to convert the contract overtime rate of 150 percent of the regular rate, into a shift differential does violence to the statute and is as erroneous as it would be to convert a shift differential into an overtime premium.

There is a clear distinction and a vast difference between the two in the industrial life of our country. The record shows and the trial judge found that:

> "A shift differential is a premium payment for work in either the second or third shift in a plant or industry where more than one shift is worked. The shift differential for the second shift is usually 5 cents or 10 cents per hour, and seldom exceeds 15 cents per hour.
>
> "There is a difference between a shift differential and overtime premium. The former is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. The latter is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from

using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate." (Record, 605-606)

The Court below held that the findings of the trial judge are supported by the evidence in these words:

> "In the instant case, the 'actual fact' concerning the 'regular rate' appears in the findings of the trial judge which are supported by the evidence and which we understand the defendants do not dispute." Reported at 162 F. 2d 665.

Respondents seek to give the impression that the requirement of time and a-half pay for "all other time" in the agreements between the parties from 1918 to 1938 was made not because these were true overtime hours, but merely undesirable hours for which the workers have sought and the employers have given extra compensation —a sort of shift differential.

The first simple answer to this contention is that the record shows that both the parties that negotiated the contract—the union and the employer—say in this record that such was not the fact; that it was not a shift differential; that never, throughout the whole series of agreements was it intended to be; and that they and the members of the union understood it to be overtime and nothing else. The record is barren of proof of any other intention or purpose in negotiation or interpretation of the contracts. The intention of the parties is further treated under subdivision "C" below.

Secondly, another difficulty with the contention that the time and a half rate for all hours outside the basic working day was a shift differential for working undesirable hours is that the meaning of "all other hours" has changed not in accordance with the desirability or undesirability of certain hours of the day, but in accordance with the change in the number of the normal, regular, working hours of the day. When the regular working day was ten hours a day, all other time comprised fourteen hours a day. When the longshoremen had won for themselves the eight hour day, all other time comprised sixteen hours a day. In brief, "all other hours," rather than being merely undesirable hours, were in fact all hours of the week outside the regular agreed upon working week. That is to say, all other hours were always the overtime hours.

More specifically, respondents seek to identify these "undesirable" hours with night time hours, and contend that the 50% premium is to compensate men for working at night. Actually, of course, during the Spring and Summer seasons, only a part of the day outside the basic working day consists of night time hours. A considerable proportion are day time hours.

While it may be that intrinsically night time hours are less desirable working hours than the day time hours, there is no intrinsic undesirability in working from 5 to 6 that would appear to make that hour worth one and one-half times the hour from 4 to 5.

The whole concept of the 50% premium as compensation for working undesirable hours falls to the ground when it is remembered that under the agreements in question, four hours of work on Saturday morning—surely "undesirable" hours where the five day week is so widespread—were paid for under the contracts here involved at straight time rates.

C. The contemporaneous acts of the same negotiating committees which negotiated the General Cargo Agreement in deliberately providing different treatment where true shifts and not overtime was involved, show that the contractual overtime rate was a true overtime rate, and therefore not the regular rate.

The question of whether a given rate is a shift differential over the regular rates is a question of fact. In resolving this question the customs of the industry, the manner in which its special problems are treated, and the intent of the parties to a collective agreement setting rates, should be determinative.

As a matter of fact, there are shifts in the longshore industry—and when there are, they have always been treated as such, and overtime rates for such shifts have not been imposed. For example, as far back as 1902, at the Great Lakes Docks, when the overtime scale was time and one-half and more, some of the agreements on the Lakes provided for the working of night shifts with either no shift differential at all, or a very small one. The 1902 agreement for the coal shovellers at Lake Erie Docks, contains a clause that overtime should be worked at all docks when required by the superintendent, but also carries this provision: "That at all ports where the business of the dock is greater than the day gang can handle, double shifts can be worked at the regular scale of wages for day work."[30]

An agreement made in 1902 with an individual company for coal handling at Escanaba, Michigan, while stipulating that the "double shift [is] to be put on only when necessary", added that "in the event of it being necessary to put on a double shift or night gang", the men are to be paid 55 cents or 5 cents an hour more than the day rate.[31]

30. *Proceedings*, I.L.A., 1902, p. 41.
31. *Proceedings*, I.L.A., 1902, p. 57.

This difference in the treatment of true shifts, as contrasted with overtime, continued right to the date of the agreement in question in these cases—and still continues, for that matter. Under the system of collective bargaining which prevailed, the negotiating committee for the I.L.A. and the employers negotiated and concluded eight different agreements dealing with different crafts. (See booklet, "Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and Vicinity, effective October 1, 1943", which forms a part of Defendants' Exhibit A.)

One of the agreements negotiated by the negotiating committees of the union and the employers simultaneously with the General Cargo Agreement in question in these cases, was the Port Watchmen's Agreement. The Port Watchmen are organized in a local of the I.L.A. Unlike the services of the workers covered by the General Cargo Agreement, the services of these longshore workers are regularly required around the clock. Here, therefore, three shifts were required, and the parties desired to provide for them. Accordingly, they negotiated an agreement—as they had done in previous years—setting up three regular shifts. The parties there used language common to industry, and provided as follows:

> "The basic working day shall consist of three shifts of eight (8) hours each, from 8 A.M. to 4 P.M., 4 P.M. to 12 Midnight, and 12 Midnight to 8 A.M. * * *" (See page 33 of booklet of Agreements referred to, *supra*.)

They provided for the same rate of pay for each of the shifts, without any differential in pay whatever, but provided for overtime at time and a half for hours worked

outside the regular shifts, whether such hours were in excess of 40 or not.

The trial court noted this agreement in its Findings of Fact:

> "The Collective Agreement for watchmen provides for a 24-hour day, with three eight-hour shifts." (Record, p. 611)

The parties knew the difference between the branch of work in their industry where shifts were regularly worked, and where there were no shifts.

There is, of course, no element of regularity in night work in the longshore industry of such a nature as would justify calling night work a shift. As the trial court found: "The amount of work which may be available for longshoremen in the Port of New York, and the time of the day, or the day of the week when said work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week and season to season" (Record, 601), and "the casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique" (Record, 599).

POINT III

The court below further erred in its application to these cases of the pertinent decisions of the Supreme Court.

At the risk of some repetition, we shall discuss this point from two aspects and shall show first, that there was no substantial factual relationship between the

Supreme Court cases relied on by the court below, and second, that the specific vices found by the Supreme Court in those cases are not present in our cases.

A. None of the cases relied on by the court below, have a substantial factual relationship to the instant cases.

In *Walling* v. *Youngerman Reynolds Hardwood Company*, 325 U. S. 419, the question involved the method of computing overtime where the workers are paid on a piece rate basis. The wage contract provided for a "regular rate" and a guaranteed piece rate. The Supreme Court found that

> "* * * the guaranteed piece rates would yield greater returns on an hourly basis for both regular and overtime work * * *" 325 U. S. 419, at page 423

than the overtime rate which would be earned by the workers at one and one-half times the contract regular rate. The rate which was yielded under the guaranteed piece rate was

> "* * * therefore the regular rate at which the stackers are employed * * *" 325 U. S. 419, at page 425.

In our cases no piece rates, guaranteed or otherwise, are involved.

In *Walling* v. *Harnischfeger Corporation*, 325 U. S. 427, there was also involved a piece work arrangement. Under the wage agreement there, the employees were each paid a basic hourly rate plus an incentive bonus. The overwhelming majority of the employees, under this arrangement, earned compensation over and above their base pay. These incentive workers frequently worked in excess of

the statutory maximum work week. The Supreme Court found that

> "For these extra hours they receive a premium of 50% of the basic hourly rate, which does not reflect the incentive bonuses received." 325 U. S. 427, at page 429.

The court held that these incentive workers

> "* * * clearly receive a greater regular rate than the minimum base rate * * *." 325 U. S. 427, at page 431.

But in the instant cases there is no incentive system, there is no regular rate as contrasted with an incentive rate designed to increase production, and there is thus no substantial factual relationship between the *Harnischfeger* case and the instant cases.

In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, the question of a split tour of duty was involved, so that the Supreme Court was led to observe "only in the extremely unlikely case where an employee's tours total more than 80 hours a week, did he become entitled to any pay in addition to the regular tour wages" previously received and further, at page 40, "* * * the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received * * *". There is no contention in our cases that any rate in controversy is a fictitious rate.

149 Madison Avenue Company v. *Asselta*, 331 U. S. 199, presents a set of facts which bear no realtion to those in our cases. There is a wide degree of difference as is indicated by the language of the Supreme Court at page 209:

> "* * * the agreement in this case was one calling for a work week in excess of 40 hours, with-

> out effective provision for overtime pay until the employees had completed the scheduled work week, and that the 'hourly rate' derived from the use of the contract formula, was not the 'regular rate' of pay within the meaning of the F.L.S.A."

In our cases the hourly rates are not derived from any formula or computation. They are clearly set forth in the contract, as are the overtime rates.

Moreover, we respectfully submit that the court below erred in its reading of the *Asselta* case in its relation to our cases. In its opinion in our cases, the court below, referring to the *Asselta* case said:

> "As recently as May, of this year, the Supreme Court, in a unanimous opinion by Chief Justice Vinson—confirming what had been said previously by this Court and by several other inferior courts—decided that the *Belo* case doctrine must be limited to agreements which contained a 'provision for a guaranteed weekly wage with a stipulation of an hourly rate', and that other types of agreement, whether or not a result of collective bargaining, cannot, by their terms, determine what is the 'regular rate' named in the Act. That 'regular rate', said the court, is an 'actual fact'. *See 149 Madison Avenue Company* v. *Asselta*, — U. S. — (May 5, 1947)". Reported at 162 F. 2d 665.

We do not so read the *Asselta* case. We respectfully submit that the court below gave to the words of the Supreme Court a meaning which is not warranted by the context of the *Belo* case and the *Asselta* case, read together.

In any event, the straight time hourly rates set forth in the agreement in our cases, were in fact the regular rates, as they had been for many years prior to the enactment of F.L.S.A., and the overtime rates set forth

in the agreement were, in fact, the true overtime rates as they had been for many years past.

Overnight Motor Transportation Company v. *Missel*, 316 U. S. 572, presented a situation where the employees worked irregular hours at a fixed weekly wage and the question was one of computing their hourly rate from their weekly rate. But in our case, no such computation is involved, since the hourly rates are specified.

The court below apparently gave some weight to *Cabunac* v. *National Terminals Corporation*, 139 F. 2d 853 (C.C.A. 7) (Record, 657-658). But in the *Cabunac* case there were two issues involved—one, the validity of a 1,000 hour exemption clause under Section 7B of the F.L.S.A. and second, the sufficiency of overtime provisions of a labor agreement. The court held that the 1,000 hour clause did not constitute an allowed exemption from the overtime provisions of the Act. Moreover, the language of the Seventh Circuit Court in the *Cabunac* decision with respect to the sufficiency of the overtime provisions referred to a situation where the differential between the regular rate and the so-called overtime rate was 17 percent—only 10 cents per hour. The court's opinion there, therefore, says that "it seems evident to us as it did to the District Court, that the 'overtime' rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workmen's standpoint, and that this rate is the 'regular rate' to be paid for work on the night shift". This would appear to be a case of a shift differential and sheds no light on a situation such as ours where the difference between the day rate and the night rate was 50 percent, and where the trial judge found as a fact that there is a vast difference between a shift differential and a 50 percent overtime premium (Record, 605, 606).

B. The vices which the Supreme Court found in the overtime wage arrangements in the cases relied on by the court below are not present in the instant cases.

In the *Youngerman Reynolds* case, 325 U. S. 419 at page 425, the Supreme Court found that the "regular rate" fixed by the contracts there in question "is never actually paid". In our cases the regular rate fixed by the contracts is an actual rate, which is paid for every hour of work during the basic work day. And, similarly, the regular rate in our cases is not an "artificial rate", as the "regular rate" in the *Youngerman Reynolds* case was found to be by the Supreme Court at page 425.

In the *Harnischfeger* case, 325 U. S. 27, at page 431, the Supreme Court found that

> "a full 50% increase in labor costs and a full 50% wage premium * * * are impossible of achievement under such a computation."

Certainly a full 50% increase in labor costs and a full 50% wage premium are achieved in our cases, in the light of the fact, as found by the trial court, that during the peacetime years from 1932 to 1937, 79.93 percent of the total number of hours worked were within the basic working day as defined by the Collective Agreement; for the 10 months between the effective date of F.L.S.A. and August 31, 1939, shortly before the outbreak of the war, the corresponding percentage was 75.03 percent (Record, p. 606), and that even during the last full year of war experience, the corresponding figure was 54.5 percent (Record, p. 607). Since all hours outside the basic working day carried a 50% premium all the longshore workers, including the respondents, not only received a 50% premium after 40 hours of work if they were performed

during the basic working day, but even before 40 hours of work, if they performed less than 40 hours of work during the basic working day and one or more hours outside the basic working day.

In the *Helmerich & Payne* case, the Supreme Court held that

> "the vice of respondents' plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-over time hours * * *. It was derived not from the actual hours and wages but from ingenious mathematical manipulations * * *." 323 U. S. at page 41.

In our cases the regular rate was actually paid—it was not dependent on any type of mathematical manipulation.

In the *Asselta* case the Supreme Court found that no adequate provision was made for overtime compensation until employees regularly hired as watchmen had worked a total of 54 hours in one week and until other regular employees had worked a total of 46 hours. 231 U. S. at pages 204-5. In our cases provision is made for payment of overtime, not only after, but before 40 hours.

In the *Overnight Transportation Co., Inc.* case the Supreme Court found that

> "there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage." 316 U. S. at page 581.

In our cases the absolute limit for contractual straight time pay was 40 hours.

And in summary, it may be said that each of the cases relied on by the court below dealt with either a situation where there was a taint of attempted evasion of the F.L.S.A., or with overtime compensation arrangements which were entered into after the Act went into effect and which were astutely devised to retain prior rates of pay.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

INTERNATIONAL LONGSHOREMENS ASSOCIATION,
Amicus Curiae,
LOUIS WALDMAN, *Counsel.*

LOUIS WALDMAN,
CHARLES H. GREEN,
Of Counsel.

Affidavit of Mailing

State of New York)
County of New York) ss.:

Before me the undersigned authority for said County in said State personally appeared VINCENT F. O'HARA who, being by me first duly sworn stated on oath that on this day of December, 1947, he deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Philip B. Perlman, Solicitor General, Department of Justice, Washington 25, D. C., counsel for the Petitioner, and to Max R. Simon, Esq., 225 West 34th Street, New York City and to Goldwater & Flynn, Esqs., 50 East 42nd Street, New York City, attorneys for Plaintiffs-Respondents.

VINCENT F. O'HARA.

Sworn to and subscribed before me this)
day of December, 1947.)

JACOB GOLDSMITH
Attorney and Counsellor-at-Law of the State of New York
Office & P. O. Add: 305 B'way, N. Y. 7, N. Y.
Residing in Queens County
Kings Co. Clk. No. 23, N. Y. Co. Clk. No. 58
Commission Expires March 30, 1948

SUPREME COURT OF THE UNITED STATES

Nos. 366–367.—October Term, 1947.

Bay Ridge Operating Co., Inc., Petitioner, 366 v. James Aaron, Albert Alston, James Philip Brooks, et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Huron Stevedoring Corp., Petitioner, 367 v. Leo Blue, Nathaniel Dixon, Christian Elliott, et al.	

[June 7, 1948.]

Mr. Justice Reed delivered the opinion of the Court.

These cases present another aspect of the perplexing problem of what constitutes the regular rate of pay which the Fair Labor Standards Act requires to be used in computing the proper payment for work in excess of forty hours. The applicable provisions read as follows:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[1]

[1] 52 Stat. 1060, 1063, approved June 25, 1938; § 7 (a) took effect 120 days later, § 7 (d). No problem as to the length of time any

The problem posed is the method of computing the regular rate of pay for longshoremen who work in foreign and interstate commerce varying and irregular hours throughout the workweek under a collective bargaining agreement for handling cargo which provides contract straight time hourly rates for work done within a prescribed 44-hour time schedule and contract overtime rates for all work done outside the straight time hours.[2]

These two suits were brought as class actions on behalf of all longshoremen employed by two stevedoring companies, Bay Ridge Operating Co., and Huron Stevedoring Corp., to recover unpaid statutory excess compensation[3]

---

employee worked is presented. See *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590; *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. , Portal to Portal Act of 1947, 61 Stat. 84.

[2] The use of the word "overtime" in the contract does not decide this case. The problem for solution is whether rates described as "overtime" by the contract actually are such rates as § 7 (a) provides for statutory excess hours.

As will hereafter appear, we consider the contract as intending to provide statutory excess compensation and overtime premium. Consequently, we accept the word "overtime" used in the contract to describe one wage scale as having been intended by the parties to the contract to satisfy fully the requirements of § 7 (a).

[3] The following phrases are used in this opinion with the following meaning. These definitions do not apply to quotations.

Extra pay.—Any increased differential from a lower pay scale for work after a certain number of hours in a workday or workweek or for work at specified hours.

Overtime premium.—Extra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.

Statutory excess compensation.—Additional compensation required to be paid by § 7 (a), F. L. S. A.

Regular rate of pay.—Total compensation for hours worked during any workweek less overtime premium divided by total number of hours worked.

The following definitions apply to the circumstances of this contract only:

Contract straight time.—Compensation paid under the longshoring

in accordance with § 16 (b) of the Fair Labor Standards Act.[4] By stipulation the claims of ten specific longshoremen in each case were severed and the two suits were consolidated for trial, leaving the claims of the other plaintiffs pending on the docket. The claims of the plaintiffs here are for the period October 1, 1943, to September 30, 1945.

The terms of employment for the respondents longshoremen working in the Port of New York, were fixed for the period in question by the collective bargaining agreement between the International Longshoremens Association and the New York Shipping Association together with certain steamship and stevedore companies. It was applicable to the two petitioners. The agreement established a "basic working day" of eight hours and a "basic working week," that is, workweek, of forty-four hours; hourly rates for different types of cargo were specified for work between 8 a. m. and 12 noon and between 1 p. m. and 5 p. m. during five working days of the week, Monday through Friday, and from 8 a. m. to 12 noon on Saturday, and a different schedule of rates for work during all other hours in the workweek. The first schedule was called "straight time" rates, and the second schedule was entitled

---

contract for work during the hours defined in par. 3 (a) of the contract, as follows: 8 a. m. to 12 noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 noon Saturday.

Contract overtime.—Additional compensation which the contract requires shall be paid for work on legal holidays and for work at hours other than those specified in par. 3 (a).

[4] 52 Stat. 1069, § 16:

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

"overtime" rates. This opinion designates these rates as contract straight time and contract overtime. For four types of cargo the overtime rates were exactly one and a half times the straight time rates; for four other types the overtime rates were slightly less than one and a half times the straight time rates. The contract straight time rates ranged from $1.25 to $2.50 an hour. The contract overtime rates were paid for all work on Sundays and legal holidays. The contract provided for no differential for work in excess of forty hours in a week.[5]

[5] The Agreement contains the following provisions with respect to the hours of work and scale of wages:

I. General Cargo Agreement.

"1. Members of the party of the second part shall have all of the work pertaining to the rigging up of ships and the coaling of same, and the discharging and loading of all cargoes including mail, ships' stores and baggage. When the party of the second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such other men as are available.

"2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

"(b) Meal hours shall be from 6 A. M. to 7 A. M., from 12 Noon to 1 P. M., from 6 P. M. to 7 P. M., and from 12 Midnight to 1 A. M.

"(c) Legal Holidays shall be: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the New Jersey Shore, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas, and such other National or State Holidays as may be proclaimed by Executive authority.

"3. (a) Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M., Monday to Friday, inclusive, and from 8 A. M. to 12 Noon Saturday.

"(b) All other time, including meal hours and the Legal Holidays

Respondents claim that their regular rate of pay under the contract for any workweek, within the meaning of § 7 (a), is the average hourly rate computed by dividing the total number of hours worked in any workweek for any single employer into the total compensation received from that employer during that week; and that in those workweeks in which they worked more than forty hours for any one employer they were entitled by § 7 (a) to statutory excess compensation for all such excess hours computed on the basis of that rate. The petitioners claim that the straight time rates are the regular rates, and that they have, therefore, with minor exceptions not presented by this review, complied with the requirements of § 7 (a). That is, no rates except straight time rates are to be taken into consideration in computing the regular rate. The petitioners contend that the contract overtime rates were intended to cover any earned statutory excess compensation and did cover it because they were substantially in an amount of one and one-half times the straight time

---

specified herein, shall be considered overtime and shall be paid for at the overtime rate.

"(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved.

"4. Wage Scale: The wage scale shall be as follows:

	Straight Time Hourly Rate	*Overtime Hourly Rate*
"(a) General Cargo of every description, including barrel oil when part of General Cargo, and all General Cargo handled in refrigerator space with the temperature above freezing	$1.25	$1.87½"
Extra rates are paid for special types of cargo. For example:		
"(d) Wet hides, creosoted poles, creosoted ties, creosoted shingles and soda ash in bags...	$1.40	$2.02½"

rates. The District Court held that the contract straight time rates were the regular rates but the Circuit Court of Appeals for the Second Circuit held otherwise.[6]

Throughout all these proceedings the petitioners have been represented by the Department of Justice, since the United States under its cost-plus contracts with the petitioners is the real party in interest. Substantially all stevedoring during the war years was performed for the account of the United States. The Solicitor General notes that prior to the decision in the Circuit Court of Appeals, 118 suits had been instituted on behalf of longshoremen, and since that time approximately 100 new complaints have been filed. Contracts of the same general type are said to have been in effect in all our maritime areas. Witnesses testifying before the Wages and Hours Subcommittee of the House Committee on Education and Labor stated that liability of the Government under such suits would be large.[7] The Wage and Hour Administrator has not filed a brief in the proceedings, but the Solicitor General has advised us that the Administrator of the Wage and Hour Division of the Department of

[6] *Addison* v. *Huron Stevedoring Corp.*, 69 F. Supp. 956; *Aaron* v. *Bay Ridge Operating Co.*, 162 F. 2d 665.

[7] Mr. Walter E. Maloney, representing the National Federation of American Shipping, testified that liability to the Government on stevedoring contracts might run as high as $260,000,000, although he admitted that the amount of liability was "almost impossible to calculate." Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 1198–1205. Committee members referred to the amounts in question as $236,000,000, $340,000,000, and $300,000,000. Hearings, *supra*, pp. 1203, 2283, 2469. The basis for such figures does not appear. Nor is it made clear whether the Portal to Portal Act was in mind. 61 Stat. 84, Pt. IV, §§ 9 and 11.

The International Longshoremens Association claims to have approximately 80,000 members in United States and Canada. Thirty thousand are said to work in the Port of New York, and the terms adopted in the New York contract are generally followed in other

Labor "believes that proper consideration was given by the court below to his interpretation of Section 7 of the Fair Labor Standards Act and that the decision below is correct." The Administrator and the Solicitor of the Department of Labor testified at length before the House committee as to their views on the issues presented by these cases.[8] *Amicus* briefs have been filed by the International Longshoremens Association, the National Association of Manufacturers, and the Waterfront Employers Association of the Pacific Coast, all urging that the decision below be reversed.

In order to fix the legal issues in their factual setting, we summarize the findings of fact made by the District Court which were accepted by the Circuit Court of Appeals and are not challenged here. Most of these findings referred to in this opinion will be found in the Appendix at 162 F. 2d 670. Employment in the longshore industry has always been casual in nature. The amount of work available depends on the number of ships in port and their length of stay and is consequently highly variable and unpredictable, from day to day, week to week, and season to season. Longshoremen are hired for a specific job at the "shape,"[9] which is normally

---

ports. The Waterfront Employers Association of the Pacific Coast states that 20,000 stevedores are covered by 21 collective bargaining contracts, of which 3 are with the International Longshoremen's and Warehousemen's Union. The current New York contract with the I. L. A. and the 21 agreements between the Pacific Association and the I. L. A. and I. L. W. U. are said to contain clauses permitting cancellation if the courts sustain the claims of plaintiffs in this suit.

[8] Hearings, *supra*, note 7, 2467–2471; 2474–2482; 2736–2762.

[9] The trial court gave the following explanation of the "shape," Finding 16:

"At three stated hours during the day, namely at 7.55 a. m., 12.55 p. m., and 6.55 p. m., men seeking employment gather in a group or semicircle, constituting the 'shape,' at the head of a pier where work is available. The foreman stevedore then selects from

held three times a day at each pier where work is available. The hiring stevedore selects the men he desires from the longshoremen who are present at the "shape"; in some instances a group of longshoremen are hired together as a gang. The work may last only for a few hours or for as long as a week. Although some work is carried on at all hours, the stevedoring companies, since operations are then carried on at less cost, attempt to do as much work as possible during the straight time hours.

The court further found that the rate for night work and holiday work had been higher than the rate for day work since at least as far back as 1887, and that since 1916, when the first agreement was made with the International Longshoremens Association, the differential had been approximately 50%. Joseph B. Ryan, President of the Association, testified that the differential was designed to shorten the total number of hours worked and to confine the work as far as possible within the scheduled forty-four hours. Despite the differential, many longshoremen were unwilling to work at night. Although some longshore work was required at all hours, except Saturday night, the District Court found that the differential had been responsible for the high degree of concentration of longshore work to the contract straight time hours.

The government introduced elaborate statistical studies to show the distribution of work as between the contract straight time and contract overtime hours. From 1932 to 1937, 80% of the total hours worked were within the contract straight time hours and only 2½%

---

the 'shape' such men as he desires to hire, to work until 'knocked off', that is, told to quit. The selection of a man from the shape carries with it no obligation on the part of the employer concerning any specified length of employment, except for work requirements of the Collective Agreement relating to minimum hours under specified conditions. The duration of employment depends entirely upon the determination of the stevedore or the steamship company."

of the total manhours were performed by men working between 5 p. m. and 8 a. m. (exclusive of Sundays and holidays) who had worked no straight time hours earlier that day. During the war, the proportion of work in contract overtime hours was considerably higher because of the greater volume of cargo handled; 55% of the total hours fell within the contract straight time hours, and the ratio of work in contract overtime hours by men who had not previously worked in the contract straight time hours was correspondingly higher. The respondents' employment was highly irregular; in many weeks the respondents did not work at all, and in weeks in which they did work their hours of employment varied over a wide range. The trial court concluded that the "basic working day" and "basic working week," [10] meaning by these phrases the contract straight time hours, were not the periods "normally, regularly, or usually" worked by the respondents. Finding 45.

In giving judgment for the petitioners, the trial court placed emphasis on the fact that the rates in question were arrived at through bona fide collective bargaining, and were more favorable to the longshoremen than the statutory mandate required. That is, that rates as high as contract straight time rates plus statutory excess compensation were paid to all workers for all work in contract overtime hours whether required by § 7 (a) or not. The District Court opinion referred to Joseph B. Ryan's statement that the International Longshoremens Association was opposed to the suit "as it might wipe out all of the

[10] The trial court found, Finding 13, that "The work week commenced on Monday at 7 a. m. and ended the following Monday at 7 a. m." The 44-hour week had been in the contracts between the Shipping Association and the Longshoremens Association prior to the Fair Labor Standards Act. No adjustment of the basic workweek was made in the contract when the 42- and 40-hour provisions of § 7 (a) became effective.

gains we had made for our men over a period of 25 years." [11] It rejected respondents' alternative contentions that the regular rate was to be determined by the average rate during the first forty hours or by the average rate for all hours worked. It noted that shift differentials were usually five or ten cents an hour and seldom exceeded fifteen cents and were not designed to deter the employer from working employees during the period for which the differential was paid; in the present case the trial judge found that the 50% differential was designed to deter and actually did deter work outside contract straight time hours. Accordingly the trial court concluded that the "collectively bargained agreement established a regular rate" under the Fair Labor Standards Act—the contract straight time rate. 69 F. Supp. 956.

The Circuit Court of Appeals held that the regular rate must be determined as an "actual fact" and could

---

[11] Mr. Ryan explained the Association objective as follows: "Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. Before there was any union we had double time for Sunday. We wanted to work in the daytime. We figured we only live once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry, when they found it too expensive to do it in any other way, have been done.

"Q. Do the men object to working outside of a normal day?—A. Absolutely."

Furthermore, as the Longshoremens Association's primary interest is as stated above by Mr. Ryan, it fears the effect on their employment contract of a holding that the contract overtime rate must be used in the determination of statutory excess compensation. The Shipping Association might insist on a reduction of the contract overtime rate, if payment of that rate were not to be treated as a satisfaction of the statutory requirements.

not be arranged through a collective bargaining agreement, citing *149 Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199. That court therefore concluded that on the basis of the findings below the regular rate must be computed by dividing the total number of hours worked into the total compensation received. The court rejected the contention that the regular rate was the average rate for the first forty hours of work, citing *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17. The judgment of the District Court was reversed with directions to determine the amounts due plaintiffs in the light of the Portal to Portal Act of 1947, 61 Stat. 84. No determination of the scope or validity of that act was attempted as those matters had not been argued. 162 F. 2d 673.

On account of the importance of the method of computing the regular rate of pay in employment contracts providing for extra pay, we granted certiorari.[12] — U. S. —.

The government adopts the view of the District Court that the contract straight time rates constituted the regular rates within the meaning of § 7 (a) of the Fair Labor Standards Act. The government accepts, too, the reasoning of the District Court that the contract overtime rates, as they were coercive in the sense that they were intended to exert pressure on employers to carry on their activities in the straight time hours, were not regular rates and could be credited against required statutory excess compensation in the amount that the contract overtime rates exceeded the contract straight time rates. The government argues in the alternative that the "normal, non-overtime workweek," said to be the hours controlling the regular rate of pay, is to be determined by reference to peacetime conditions, rather than the abnormal wartime conditions, and that the statistical studies show that

[12] See note 7, *supra*.

the work of longshoremen is sufficiently concentrated within the scheduled hours to compel the finding that the contract straight time hours are the regular working hours. The government urges also that the contract, as thus interpreted, accords with congressional purposes in enacting the Fair Labor Standards Act. It is said to reduce working hours and spread employment and to preserve the integrity of collective bargaining.

We agree with the conclusion reached by the Circuit Court of Appeals. Later in this opinion, pp. 17–23, we set out our reasons for concluding that the extra pay for contract overtime hours is not an overtime premium. Where there are no overtime premium payments the rule for determining the regular rate of pay is to divide the wages actually paid by the hours actually worked in any workweek and adjudge additional payment to each individual on that basis for time in excess of forty hours worked for a single employer. Any statutory excess compensation so found is of course subject to enlargement under the provisions of § 16 (b). Compare § 11 of Portal to Portal Act of 1947. This determination, we think, accords with the statute and the terms of the contract.

(1) The statute, § 7 (a), expresses the intention of Congress "to require extra pay for overtime work by those covered by the Act even though their hourly wages exceeded the statutory minimum." The purpose was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost.[13] The statute by its terms protects the group of employees by protecting each individual employee from overly long hours. So although only one of a thousand

[13] *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577, 578; *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40; *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 706; *Jewell Ridge Corp.* v. *Local*, 325 U. S. 161, 167.

works more than forty hours, that one is entitled to statutory excess compensation. That excess compensation is fixed by § 7 (a) "at one and one-half times the regular rate at which he is employed." The regular rate of pay of the respondents under this contract must therefore be found.

The statute contains no definition of regular rate of pay and no rule for its determination. Contracts for pay take many forms. The rate of pay may be by the hour, by piecework, by the week month or year, and with or without a guarantee that earnings for a period of time shall be at least a stated sum. The regular rate may vary from week to week. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 580; *Walling* v. *Belo Corp.*, 316 U. S. 624, 632. The employee's hours may be regular or irregular. From all such wages the regular hourly rate must be extracted. As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency.[14]

Every contract of employment, written or oral, explicitly or implicitly includes a regular rate of pay for the person employed. *Walling* v. *Belo Corp.*, *supra*, 631; *Walling* v. *Halliburton Oil Well Cementing Co.*, *supra*. We have said that "the words 'regular rate' . . . obviously mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 40. See *United States* v. *Rosenwasser*, 323 U. S. 360, 363. "Wage divided by hours equals regular rate." *Overnight Motor Co.* v. *Missel*, *supra*, 580. "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive

[14] *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 523; see § 9, Part IV, Portal to Portal Act, 61 Stat. 84.

of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424–25. The result is an "actual fact." *149 Madison Ave. Corp.* v. *Asselta*, *supra*, 204.

In dealing with such a complex situation as wages throughout national industry, Congress necessarily had to rely upon judicial or administrative application of its standards in applying sanctions to individual situations. These standards had to be expressed in words of generality. The possible contract variations were unforeseeable. In *Walling* v. *Belo Corp.*, *supra*, 634, this Court refrained from rigidly defining "regular rate" in a guaranteed weekly wage contract that met the statutory requirements of § 7 (a) for minimum compensation. In the *Belo* case the contract called for a regular or basic rate of pay above the statutory minimum and a guaranteed weekly wage of 60 times that amount. As the hourly rate was kept low in relation to the guaranteed wage, statutory overtime plus the contract hourly rate did not amount to the guaranteed weekly wage until after 54½ hours were worked. P. 628. We refused to require division of the weekly wage actually paid by the hours actually worked to find the "regular rate" of pay and left its determination to agreement of the parties. Where the same type of guaranteed weekly wages were involved, we have reaffirmed that decision as a narrow precedent principally because of public reliance upon and congressional acceptance of the rule there announced. *Walling* v. *Halliburton Co.*, *supra*. Aside from this limitation of *Belo*, the case itself is not a precedent for these cases as in *Belo* the statutory require-

ments of minimum wages and statutory excess compensation were provided by the Belo contract. In these present cases no provision has been made for any statutory excess compensation and none can be earned by any respondent based on the contract overtime pay. Our assent to the *Belo* decision, moreover, does not imply that mere words in a contract can fix the regular rate.[15] That would not be the maintenance of a flexible definition of regular rate but a refusal to apply a statutory requirement for protecting workers against excessive hours. The results on the individual of the operations under the contract must be tested by the statute.[16] As Congress left the regular rate of pay undefined, we feel sure the purpose was to require judicial determination as to whether in fact an employee receives the full statutory excess compensation, rather than to impose a rule that in the absence of fraud or clear evasion employers and employees might fix a regular rate without regard to hours worked or sums actually received as pay.

Further, we reject the argument that under the statute, an agreement reached or administered through collective bargaining is more persuasive in defining regular rate than individual contracts. Although our public policy recognizes the effectiveness of collective bargaining and encourages its use,[17] nothing to our knowledge in any act authorizes us to give decisive weight to contract declara-

---

[15] *149 Madison Ave. Corp.* v. *Asselta, supra,* p. 204: "The crucial questions in this case, however, are whether the hourly rate derived from the formula here presented was, in fact, the 'regular rate' of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 432.

[16] *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* 424; *Walling* v. *Harnischfeger Corp., supra,* 430.

[17] National Labor Relations Act 49 Stat. 449; Labor Management Relations Act of 1947, 61 Stat. 136; Norris-LaGuardia Act, 47 Stat. 70, § 2; Portal to Portal Act of 1947, 61 Stat. 84, § 1.

tions as to the regular rate because they are the result of collective bargaining. *149 Madison Ave. Corp.* v. *Asselta, supra*, 202 and 204; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 432.[18] A vigorous argument is presented for petitioners by the International Longshoremens Association that a collectively obtained and administered agreement should be effective in determining the regular rate of pay[19] but we think the words of and practices under the contract are the determinative factors in finding the regular rate for each individual.

As the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract. We think the most reasonable conclusion is that Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that represents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division. This deduction of overtime premium from the pay for the workweek results from the language

---

[18] The contention, however, found favor with the District Court: "Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live." 69 F. Supp. 956, 959.

[19] "Collective bargaining, to be effective, must necessarily deal with large groups—with all the workers in the industry, or its subdivision, on whose behalf the bargaining is being conducted. And when, as in the I. L. A., such collective agreements are submitted to a vote of the membership affected, and that approval of the bargain thus arrived at is voted, it would make of collective bargaining a mockery if some of them could seek special terms, because, for a short period of time, their work experience has varied in some degree from that of their fellow workers."

of the statute. When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended. In order to avoid a similar double payment, we think that any overtime premium paid, even if for work during the first forty hours of the workweek, may be credited against any obligation to pay statutory excess compensation. These conclusions accord with those of the Administrator.[20]

The definition of overtime premium thus becomes crucial in determining the regular rate of pay. We need not pause to differentiate the situations that have been described by the word "overtime."[21] Sometimes it is used to denote work after regular hours, sometimes work after hours fixed by contract at less than the statutory maximum hours and sometimes hours outside of a specified clock pattern without regard to whether previous work has been done, *e. g.*, work on Sundays or holidays. It is not a word of art. See Premium Pay Provisions in Union Agreements, Monthly Labor Review, United States Department of Labor, October 1947, Vol. 65, No. 4. Overtime premium has been used in this opinion as defined in note 3. It is that extra pay for work because of

[20] See note 30 and *Walling* v. *Youngerman-Reynolds Hardwood Co.*, *supra*, 424–25.

[21] Cf. Finding 28 (a): "Prior to the Fair Labor Standards Act, the word overtime had a generally accepted meaning in American industry, namely, excess time, to which a penalty rate of compensation was applied to discourage such work. The idea of excessivity, however, was not an indispensable element of the concept of overtime as understood. Overtime was also understood to cover hours outside of a specified clock pattern."

previous work for a specified number of hours in the workweek or workday. It is extra pay of that kind which we think that Congress intended should be excluded from computation of regular pay. Otherwise the purpose of the statute to require payment to an employee for excess hours is expanded extravagantly by computing regular rate of pay upon a payment already made for the same purpose for which § 7(a) requires extra pay, to wit, extra pay because of excess working hours. Accordingly, statutory excess compensation paid for work in excess of forty hours should not be used to figure the regular rate. Neither should similar contract excess compensation for work because of prior work be used in such a calculation. Extra pay by contract because of longer hours than the standard fixed by the contract for the day or week has the same purpose as statutory excess compensation and must likewise be excluded.[22] Under the definition, a mere higher

[22] The holding in *Walling* v. *Helmerich & Payne*, *supra*, is not to the contrary of this position. The facts of that case indicated a palpable evasion of the statutory purposes. See 69 F. Supp. at p. 958, note 1.

Nor is the decision in *149 Madison Ave. Corp.* v. *Asselta*, *supra*, opposed to this position. In that case weekly wage contracts calling for a workweek of 46 and 54 hours provided the following formula for determining the regular hourly rate of pay: "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of forty (40) hours." 331 U. S. at 202. Under that method of computation an employee who worked 46 hours received a sum equal to what he would have received if he had been paid for 40 hours' work at the formula hourly rate and 6 hours of work at one and a half times the formula rate. As so construed, the extra pay for work in excess of 40 hours would be an overtime premium which could be excluded from the computation of the regular rate; and the regular rate would be the formula rate. The Court did not reach the question of the legality of that method of computation as it held that since the formula rate was not consistently employed in determining compensation, the formula rate could not be

rate paid as a job differential or as a shift differential, or for Sunday or holiday work, is not an overtime premium. It is immaterial in determining the character of the extra pay that an employee actually has worked at a lower rate earlier in the workweek prior to the receipt of the higher rate. The higher rate must be paid because of the hours previously worked for the extra pay to be an overtime premium.

The trial court refused to accept the respondents' contention that the contract overtime rate was a shift differential, partly because it was felt that such a holding would have a disruptive effect on national economy. 69 F. Supp. 958–59. We use as examples three illustrations employed by the District Court to illustrate its understanding of the effect of respondents' contentions to employment situations. That court thought these illustrations indicated additional liability from the employer under § 7 (a).[22] We do not agree. Our conclusions as

---

considered the regular rate for those who worked more than 40 hours. Accordingly the regular rate was held to be the average of all wages actually paid during the entire week. See *Asselta* v. *149 Madison Ave. Corp.*, 156 F. 2d 139, 141.

[22] The opinion stated:

"This controversy requires for its resolution a delicate adjustment to accommodate the harmonious application of three national policies. A heavy handed meshing of these three policies with the industrial machine which fails to minimize the friction at their points of contact can generate enough heat to impair one or more of the policies or severely injure the machine itself.

"In chronological order we have (1) the National Labor Relations Act, July 5, 1935, 49 Stat. 449, . . . to encourage the practice of collective bargaining; (2) the Fair Labor Standards Act, June 25, 1938, 52 Stat. 1060, . . . to correct and eliminate the labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers; (3) the national need during the war for the maximum of production as illustrated by Executive Order 9301, February 9, 1943, 8 Fed. Reg. 1825, establishing the 48 hour week for the duration of the war." 69 F. Supp. 956, 958.

to the trial court's illustrations vary from those of the trial court because that court did not deduct overtime premiums, as we have defined them, actually paid from the weekly wage before dividing by the hours worked. See quotation from *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* at p. 14 of this opinion. (1) The employment contract calls for an overtime premium for work beyond thirty-six hours. Such extra pay should not be included as weekly wages in any computation of the regular rate at which a man works.[24] (2) A contract provides for payment of time and a half for work in excess of eight hours in a single workday. An employee who works five ten-hour days would have no claim for statutory excess compensation if paid the amount due by the contract.[25] Or (3) a contract provides for a rate of $1 an hour for the first 40 hours and $1.50 for all excess hours; an employee works 48 hours and receives $52. To find his regular rate of employment, the overtime premium of $4 should be deducted and the resulting sum divided by 48 hours.[26] On the other hand, a man might be employed as a night watchman on an eight-hour shift at time and a half the wage rate of day watchmen. This would be extra pay for undesirable hours. It is a shift differential. It would not be overtime premium

---

[24] 36 hours×$1+14 hours×$1.50=total wages $57. Regular rate=$57, less overtime premium of $7, ÷50 hours=$1 per hour.

[25] 5 days×8 hours at $1 per hour+5 days×2 hours at $1.50 per hour=$55 total wage. Regular rate=$55−$5 ÷50=$1 per hour.

[26] Executive Order 9301, issued February 9, 1943, 8 F. R. 1825, provided that all government contractors should work their employees at least 48 hours per week. The Order provided that it should not be construed as superseding the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary workweek, nor as suspending or modifying any provision of the Fair Labor Standards Act or any other law relating to the payment of wages or overtime.

pay but would be included in the computation for determining overtime premium for any excess hours.[27]

Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor rather than an overtime premium.[28] Such payments enter into the determination of the regular rate of pay. See *Cabunac* v. *National Terminals Corp.*, 139 F. 2d 853.

The trial court seemed to assume that if the contract overtime rate were a shift differential, the employee who worked on a higher paid shift would be entitled to have his higher shift rates enter into the computation of regular rate of pay. One of the reasons for not allowing the

---

[27] For example, daytime watchman's pay, $.60 per hour. Nighttime watchman's pay $.90 per hour, eight-hour, seven-day shift. Sixteen hours would be compensated for at excess time rates. The watchman's pay would be 56×$.90=$50.40. His statutory excess pay 16×$.45=$7.20; total $57.60. His regular rate is ($57.60—$7.20)÷56 or $.90 per hour.

Compare Legal Field Letter 109, Office of the Solicitor, Department of Labor, July 31, 1946, 1947 Wage-Hour Man. 66, in which the Chief of the Wage-Hour Section characterizes a particular 50% differential as a shift differential.

[28] This is well brought out by a case similar in character to this litigation. *Ferrer* v. *Waterman S. S. Corp.*, 70 F. Supp. 1. There the wage schedule was as follows, p. 3:

GENERAL CARGO

From	*To*	*Work Days*	*Holidays*
7 A. M.	12 M. D.	$0.55	$0.77
12 M. D.	1 P. M.	0.90	1.60
1 P. M.	4 P. M.	0.55	0.77
4 P. M.	6 P. M.	0.77	0.84
6 P. M.	7 P. M.	0.90	1.20
7 P. M.	11 P. M.	0.77	0.84
11 P. M.	12 M. N.	0.90	1.25
12 M. N.	6 A. M.	0.84	1.02
6 A. M.	7 A. M.	1.30	1.40

contract overtime rates in the computation of regular rate of pay was that it thought the great difference between the contract straight time and contract overtime rates showed that the premium paid by contract was not a shift differential but a true overtime premium. In this we think the trial court erred. The size of the shift differential cannot change the fact that large wages were paid for work in undesirable hours. It is like a differential for dangerous work. This contract called for $2.50 straight time hourly rate for handling explosives. The statutory excess compensation would, of course, be $3.75 per hour. If an employee receives from his employer a high hourly rate of pay for hard or disagreeable duty, he is entitled to the statutory excess compensation figured on his actual pay.

Nor do we find the District Court's reliance upon the fact that the overtime rates were employed in order to concentrate the work of the longshoremen in the straight time hours relevant to a determination of the respondents' rate of pay. The District Court thought the concentration was significant. It did not test whether the contract overtime rates contained overtime premium payments by considering whether the employee actually received extra compensation for excess hours. We accept the District Court's holding that this concentration was an intended effect of the overtime rates and that the higher rates did contribute to the concentration of the work in the straight time hours as set out in a preceding paragraph of this opinion. P. 9 *supra.* Such a concentration tends, in some respects, to the employment of more men, as there is pressure for more work to be done in the straight time hours. *Overnight Motor Co.* v. *Missel, supra,* 578. However, the pressure of the contract overtime wages is not solely toward a spread of employment. Since work is in fact done outside straight time hours, the employer can use men who have previously worked in straight time

hours in contract overtime hours without additional cost.

But spread of employment is not the sole purpose of the forty-hour maximum provision of § 7 (a). Its purpose is also to compensate an employee in a specific manner for the strain of working longer than forty hours. *Overnight Motor Co.* v. *Missel, supra,* 578. The statute commands that an employee receive time and one-half his regular rate of pay for statutory excess compensation. The contract here in question fails to give that compensation to an employee who works all or part of his time in the less desirable contract overtime hours. Looked at from the individual standpoint of respondents, the concentration of work does not have any effect upon their regular rate of pay. Because of this defect, the concentration of work brought about by the contract has no effect in the determination of the regular rate of pay. As we indicated at the beginning of this subdivision (1) a major purpose of the statute was to compensate an employee by extra pay for work done in excess of the statutory maximum hours. Thus the burdens of overly long hours are balanced by the pay of time and a half for the excess hours.

We therefore hold that overtime premium, deductible from extra pay to find the regular rate of pay, is any additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute.[29]

---

[29] We avoid any extended discussion of respondents' suggestion that the proper way to determine the regular rate is to divide the wages received during the first forty hours of work in a week by 40. The quotient, it is suggested, would be the regular rate. One fault of that method, we think, is that such wages might contain overtime premium payments; for example, a contract which fixed a rate for 36 hours and a higher rate for subsequent hours. Another objection

(2) Since under Interpretative Bulletin No. 4, § 69, the Administrator refers to regular working hours as important in calculating the regular rate of pay under § 7 (a) of the Act, a word must be said as to regular working hours in this case.[20] "Regular working hours" apparently has not been defined by the Administrator. He could hardly have intended in § 69 to employ the statutory maximum hours as synonomous with regular working hours as there is no prohibition on regular working hours that are longer than the statutory maximum. His illustrations, numbers 2 and 3, show that overtime premiums may be earned within the first 40 hours of a workweek. The statutory maximum hours are significant only as requiring overtime premium pay. An employer

---

is that such a method of computation would give an improperly weighted average for the rate of pay for the entire week; an employee who performed more highly skilled or unpleasant work after 40 hours of work would not receive the proper amount of statutory excess compensation if the regular rate were computed only on the basis of the first 40 hours. The statement as to statutory excess hours in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 423, was made as to a situation where this Court concluded the dual pay plan of the case was "wholly unrealistic and artificial . . . so as to negate the statutory purposes." The problem we are here considering was not at issue.

[20] The question is sufficiently shown by this excerpt: "Extra compensation paid for overtime work, even if required to be paid by a union agreement or other agreement between the employer and his employees need not be included in determining the employee's regular hourly rate of pay (see par. 13 of this bulletin). Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as *compensation for overtime work—that is, for hours worked outside the normal or regular working hours*—regardless of whether he is required to pay such compensation by a union or other agreement." Interpretative Bulletin No. 4, United States Department of Labor, Wage and Hour Division, Office of the Administrator, revised November 1940.

may increase pay or decrease hours free as to those steps from statutory regulation. See article in Monthly Labor Review, *supra*. The trial court pointed out that "The identifying mark of the case at bar is the absence of any norm, any regularity. Both parties have emphasized the casual, irregular character of the employment." 69 F. Supp. 959–60. The trial court, as we have heretofore stated, p. 9, also found that the "basic working day," defined by § 2 (a) of the agreement set forth in note 5, *supra*, was not the day normally, regularly or usually worked by respondents. Indeed the contract, § 1, required these round-the-clock irregular hours from some individuals. We call attention to the problem only to lay it aside as inapplicable in this case.

However, the government contends in this case that regular working hours are important, that the contract fixed regular working hours as the straight time hours and that as an actual fact as shown by the statistics of concentration of work in straight time hours, p. 9 *supra*, the straight time hours were the regular working hours of all longshoremen. The government concludes from this that the contract straight time pay is the regular rate of pay and the contract overtime pay includes a true overtime premium. We may be mistaken in thus limiting the government's argument on this point. If the government means that any extra pay to an employee for work outside regular working hours of the group of employees is to be excluded from the computation of the regular rate, we do not think that contention sound. The defect in this argument, however the government's position is construed, is that it treats of the entire group of longshoremen instead of the individual workmen, respondents here. The straight time hours can be the regular working hours only to those who work in those hours. The work schedule of other individuals in the same general employment is of no importance in determining regular working hours of a single individual.

As a matter of fact, regular working hours under a contract, even for an individual, has no significance in determining the rate of pay under the statute. It is not important whether pay is earned for work outside of regular working hours. The time when work is done does not control whether or not all or a part of the pay for that work is to be considered as a part of the regular pay.

We think, therefore, that this case presents no problems that involve determination of the regular hours of work. As an employment contract for irregular hours the rule of dividing the weekly wage by the number of hours worked to find the regular rate of pay would apply. Cf. *Overnight Motor Co.* v. *Missel, supra*, at 580.

(3) The contract was interpreted by the Shipping Association and the Longshoremens Association as providing that the contract straight time was the regular rate. The parties to the contract indicated by their conduct that the contract overtime was the statutory excess compensation or an overtime premium. Finding 43, 162 F. 2d at 672; see note 33 *infra*.[31] Apparently no dispute or controversy arose over this interpretation although the contract, § 19, made provision for the resolution of such disagreements. The trial court determined that the straight time hourly rate was the regular rate at which respondents were employed.[32] This construction by the parties and the court's conclusion, supported by evidence, leads us to consider this agreement as though there was a

---

[31] As a matter of fact in half of the cargo classifications, the overtime rate was a few cents less per hour than time and a half the straight time rates.

[32] Conclusion of Law No. 3: "The 'straight time hourly rate' set forth in each subdivision of Paragraph 4 of the Collective Agreement, as stated in Finding of Fact No. 9, constituted the regular rate at which plaintiffs were employed when handling the stated kind of cargo."

paragraph which read to the effect that the straight time rate is the regular rate of pay. We should also consider that the contract provided that the contract overtime rates were intended to provide any statutory excess compensation, when men worked more than forty hours except in those situations where the entire time, including the excess, was in the straight time hours.[25] This of course does not mean that respondents here were familiar with these purposes of the agreement. So far as the record shows, they worked for the pay promised under the words of the contract. It shows nothing more on this point.

Under the contract we are examining, the respondents' work in overtime hours was performed without any relation as to whether they had or had not worked before. Under our view of § 7 (a)'s requirements their high pay was not because they had previously worked but because of the disagreeable hours they were called to labor or because the contracting parties wished to compress the regular working days into the straight time hours as much as possible. As heretofore pointed out, we need not determine what were the regular working hours of these respondents. If it were important, the trial court determined that their regular working hours were not the straight time hours. They worked at irregular times. Finding 45, 162 F. 2d at 672. The record shows that all respondents worked 5,201 straight time hours and 20,771

---

[25] It is clear under the applicable section of the agreement, § 2 (a), note 5 above, that a man could work all his time wholly in contract overtime hours. An employee received overtime premium for work done in what the trial court considered to be the basic workweek. Finding 43 (a): "If, and only if, a longshoreman worked more than 40 hours between 8 a. m. and 12 noon, and 1 p. m. and 5 p. m. on Mondays to Fridays, inclusive, and between 8 a. m. and 12 noon on Saturday of that workweek, none of these days being a holiday, he was paid an additional sum for work on Saturday morning in excess of 40 hours—namely 62½ cents per hour, . . ."

overtime hours. Four of the twenty respondents worked no straight time hours. Five others worked less than 100 straight time hours. Three worked more straight time than overtime. The record does not show the hours these respondents worked for other employers. That fact is immaterial in this case as respondents seek recovery only from petitioner employers. These round-the-clock hours were in strict accordance with the contract which allowed the Longshoremens Association to furnish all men needed and called for the men to "work any night of the week, or on Sundays, holidays or Saturday afternoons when required." §§ 1 and 2; see note 5. Men who worked contract overtime hours were entitled to contract overtime pay. They were given no overtime premium pay because of long hours. It is immaterial that his regular rate may greatly exceed the statutory minimum rate. This contract overtime rate, therefore, did not meet the excess pay requirements of § 7.

In finding the statutory excess compensation due respondents, the trial court must determine the method of computation. Each respondent is entitled to receive compensation for his hours worked in excess of forty at one and a half times his regular rate, computed as the weighted average of the rates worked during the week. In computing the amount to be paid, the petitioners may credit against the obligation to pay statutory excess compensation the amount already paid to each respondent which is allocable to work in those excess hours. The precise method for computing this credit presents the difficulty. According to the Administrator's interpretation, an employer may credit himself with an amount equal to the number of hours worked in excess of forty multiplied by the regular rate of pay for the entire week rather than an amount equal to the number of hours worked in excess of forty multiplied by the average rate of pay for

those excess hours.[34] Under that formula each respondent is entitled, as statutory excess compensation, to an additional sum equal to the number of hours worked for one employer in a workweek in excess of forty, multiplied by one-half the regular rate of pay. On the record before us, that interpretation seems to be a reasonable one; we leave a final determination of the point to the District Court on further proceedings.

The Circuit Court ordered the case remanded to the District Court for determination of the amounts due respondents in accordance with its opinion. By a further order, it allowed the District Court to consider any matters presented to it by petitioners as a defense in whole

---

[34] See Interpretative Bulletin No. 4, § 14. The Administrator illustrates his position with the following example: an employee works 30 hours a week at an occupation paying 40 cents an hour and 20 hours in the same week at an occupation paying 50 cents an hour. The employee's regular rate of pay is 44 cents an hour (30 hours×40 cents+20 hours×50 cents÷50 hours), and he is entitled to receive $2.20 in addition to the $22 he has already received, equal to the number of overtime hours (10) multipled by one-half the regular rate of pay (22 cents).

If it were held that an employer, under the contract we are here considering, could credit himself only with the wages actually paid during the hours following the first 40, an employee who performed 40 hours of contract overtime work early in the week and 10 hours of straight time after the first 40 hours would receive a larger award than an employee who first worked 10 straight time hours and then worked 40 contract overtime hours. Such a variation in the amount of statutory excess compensation would not be in accord with the statutory purpose.

Compare, however, Releases 1913 and 1913 (a) issued by the Administrator on December 1, 1942 and January 5, 1943, which provide that an employer may if he so elects compute the regular rate on the basis of the number of hours worked in excess of 40. If that method of computation of the regular rate is followed, an employer could credit himself with the wages actually paid during the hours in excess of 40.

or in part under the Portal to Portal Act. We modify these orders so as to permit the District Court to allow any amendments to the complaint or answer or any further evidence that the District Court may consider just.

As so modified the judgment of the Circuit Court of Appeals is affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

Nos. 366–367.—October Term, 1947.

Bay Ridge Operating Co., Inc., Petitioner, 366 *v.* James Aaron, Albert Alston, James Philip Brooks, et al. Huron Stevedoring Corp., Petitioner, 367 *v.* Leo Blue, Nathaniel Dixon, Christian Elliott, et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 7, 1948.]

Mr. Justice Frankfurter, with whom Mr. Justice Jackson and Mr. Justice Burton concur, dissenting.

No time is a good time needlessly to sap the principle of collective bargaining or to disturb harmonious and fruitful relations between employers and employees brought about by collective bargaining. The judgment of Congress upon another doctrinaire construction by this Court of the Fair Labor Standards Act ought to admonish against an application of that Act in disregard of industrial realities. Promptly after the Eightieth Congress convened, Congress proceeded to undo the disastrous decisions of this Court in the so-called portal-to-portal cases. Within less than a year of the decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, both Houses, by overwhelming votes that cut across party lines, passed, and the President signed, the Portal-to-Portal Act of 1947. What is most pertinent to the immediate problem before us is the fact that because the Fair Labor Standards Act had been "interpreted judicially in disregard of long established customs, practices and contracts between em-

ployers and employees," Congress had to undo such judicial misconstruction because it found that "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and employees and employees would be created."[1] Because the present decision is heedless of a long-standing and socially desirable collective agreement and is calculated to foster disputes in an industry which has been happily at peace for more than thirty years, I deem it necessary to set forth the grounds of my dissent.

The Court's opinion is written quite in the abstract. It treats the words of the Fair Labor Standards Act as though they were parts of a cross-word puzzle. They are, of course, the means by which Congress sought to eliminate specific industrial abuses. The Court deals with these words of Congress as though they were unrelated to the facts of industrial life, particularly the facts pertaining to the longshoremen's industry in New York. The Court's opinion could equally well have been written had the history of that industry up to 1916 not been an anarchic exploitation of the necessities of casual labor for want of a strong union to secure through equality of bargaining power fair terms of employment. See, *e. g.*, Barnes, The Longshoremen (1915), *passim*. Through such bargaining power the agreement was secured which the Court now upsets. Through this agreement, the rights and duties of the industry—the members of the union on the one hand and the employers on the other hand—were defined, and the interests of the men, the employers, and, not least, the community were to be adjusted in a rational and civilized way. On behalf of a few dissident members of the union, but against the protests of the union and of the employers and of the

[1] Section 1 (a), Portal-to-Portal Act of 1947, 61 Stat. —, 29 U. S. C. § 251 (a).

Government, the Court dislocates this arrangement and it does so by what it conceives to be the compulsions of § 7 (a) of the Fair Labor Standards Act.[2] This is to attribute destructive potency to two simple English words—"regular rate"—far beyond what they deserve.

Employment of longshoremen has traditionally been precarious because dependent on weather, trade conditions, and other unpredictables. Decasualization of their work has been their prime objective for at least sixty years. They have sought to achieve this result by inducing concentration of work during weekday daytime hours.

One of the strongest influences to this end is to make it economically desirable. And so the union has sought and achieved an addition to the basic—the regular—rate sufficiently high to deter employers from assigning work outside of defined periods, except in emergencies. Since 1916, when the International Longshoremens Association made its first collective agreement with waterfront employers in New York, a 50% premium on night and weekend work has generally prevailed. In the industry, this has been colloquially called "overtime" pay.

Longshoremen do not usually work continuously for one employer, but shift from one to another, wherever employment can be found. The Fair Labor Standards Act does not entitle an employee who works a total of over forty hours per week for several employers, but not more than forty hours for any one of them, to any overtime pay. In view of the peculiarities of this industry, therefore, the only effective way of promoting the aim of the

[2] "No employer shall . . . employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1060, 1063, 29 U. S. C. § 207 (a).

Fair Labor Standards Act, to deter a long workweek, is that devised by the collective agreement, namely, to limit to approximately the statutory maximum of hours the total length of the periods in the week for which additional pay amounting to overtime rates need not be paid, regardless of the employer for whom the work is done.

During the period (1943–45) in controversy, the wage rates were governed by the 1943 General Cargo Agreement between the International Longshoremens Association and the employers at the Port of New York. Under its terms, the "basic working week," for which "straight time" hourly rates were paid, included the hours of 8 a. m. to noon, and 1 p. m. to 5 p. m., Monday through Friday, and 8 a. m. to noon on Saturday.[3] "Overtime" rates, for "all other time," were in almost all instances[4] 150% of the "straight time" rates. The 1943 Agreement em-

---

[3] "2 (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

"(b) Meal hours shall be from 6 a. m. to 7 a. m., from 12 Noon to 1 p. m., from 6 p. m. to 7 p. m., and from 12 Midnight to 1 a. m.

"3 (a) Straight time rate shall be paid for any work performed from 8 a. m. to 12 Noon and from 1 p. m. to 5 p. m., Monday to Friday, inclusive, and from 8 a. m. to 12 Noon Saturday.

"(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

"(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until the men are relieved. . . ."

[4] For purposes of this case, the "overtime" rate may be regarded as 150% of "straight time" in all instances, since the District Court allowed the respondents to recover for those few instances where the "overtime" was slightly less, and this portion of its judgment was not appealed.

bodied the practice of the industry since 1916, whereby approximately 150% of "straight time" rates was paid for night and weekend work. Through the years, with successive renewals of agreements between the International Longshoremens Association and the employers, the rates of pay have risen and the length of the "basic working week" has decreased. The respondents, members of the International Longshoremens Association, did a large part of their work for the petitioners outside of the enumerated "straight time" hours. In accordance with the collective agreement, they received, for whatever work they did during the "basic working week," "straight time" pay, and for work at all other times, "overtime" pay, drawing such "overtime" pay regardless of whether such work was or was not part of their first forty hours of work in the week.[5] They instituted this action, for double damages under § 16 (b) of the Fair Labor Standards Act, 52 Stat. 1060, 1069, 29 U. S. C. § 216 (b), asserting that night and weekend work had been so frequent an incident of their employment that the contractual "straight time" pay could not be deemed their "regular rate" of pay, under § 7 (a), but that their "regular rate" was the average of what they received for all their work for any one employer, "straight time" and "overtime" together. On this theory, rejected by the union, the employers, and the Government, but now accepted by the Court, all work beyond forty hours per week for any one employer should have been paid for at one and one-half times this average.

The statutory phrase "regular rate" is not a technical term. Thirteen expressions used in the Fair Labor Stand-

[5] On the other hand, although the contract did not so specify, in the unusual situation of a longshoreman working over forty hours of "straight time" for one employer in one week, he was paid time and a half for the excess. Where this had not been done, the District Court allowed appropriate recovery, and this was not appealed.

ards Act were defined by Congress in § 3. "Regular rate" was left undefined. The legislative history of the phrase reveals only that it replaced "agreed wage" in an earlier draft, but there is no indication that this modification had significance. Nor is there any indication that in the field of labor relations, "regular rate" was a technical term meaning the arithmetic average of wages in any one week. If ordinary English words are not legislatively defined, they may rightly be used by the parties to whom they are addressed to mean what the parties through long usage have understood them to mean, when the words can bear such meaning without doing violence to English speech. The "regular rate" can therefore be established by the parties to a labor agreement, provided only that the rate so established truly reflects the nature of the agreement and is not a subterfuge to circumvent the policy of the statute. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424. Thus the problem before us is whether the designation of "straight time rates" for the "basic working week" in the longshoremen's collective agreement was an honest reflection of the distinctive conditions of this industry.

We are not concerned with an abstract "regular rate" of pay, for industry is not. The "regular rate" in a given industry must be interpreted in the light of the customs and practices of that industry. The distinctive conditions of the longshoremen's trade, where employees frequently work during one week for several different employers, are reflected in the provisions which the industry has made in determining rates of compensation. These provisions were designed to secure for longshoremen protection not only from harmful practices common to many industries and dealt with specifically by the statute, but also from those peculiar to the longshoremen's industry, requiring special treatment.

The respondents' wages, as part of a comprehensive arrangement for the betterment of the longshoremen's trade—also covering health and sanitary provisions, minimum number of men in a gang doing specified types of work, "shaping time," minimum hours of employment for those chosen at a "shape," arbitration, etc.—were determined by a collective agreement entered into between the union and the employers. The Fair Labor Standards Act was "intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining." H. Rep. No. 1452, 75th Cong., 1st Sess., p. 9. "The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." Sen. Rep. No. 884, 75th Cong., 1st Sess., pp. 3–4.[6] Such assurances were necessary to allay the traditional hostility of organized labor to legislative wage-fixing. The Court now holds unlawful a collective agreement entered into by

[6] Similar intentions were expressed again and again in the Committee Hearings and on the floor of both Houses of Congress by the spokesmen of the Administration and Congressional Committee members. See the Joint Hearings before the Senate Committee on Labor and Education and the House Committee on Labor, 75th Cong., 1st Sess., pp. 46–47 (Asst. Atty. Gen. Jackson); *id.* pp. 181–83 (Secy. Perkins and Sen. Walsh); 81 Cong. Rec. 7650, 7651, 7808 (Sen. Black); 7652, 7799, 7800, 7885–86, 7937 (Sen. Walsh); 7813 (Sen. Pepper); 82 Cong. Rec. 1390 (Rep. Norton); 1395 (Rep. Randolph); 83 Cong. Rec. 7291 (Rep. Allen); 7310 (Rep. Fitzgerald); 9258 (Rep. Randolph).

a strong union, governing the wide range of the longshoremen's employment relationships, and especially designed to restrict the hours of work and to require the same premium as that given by the statute for work done outside of normal hours but within the statutory limit. The Court substitutes an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive of the process of collective bargaining under which the industry has been carried on. But, we are told, these untoward consequences are compelled by a mere reading of what Congress has written.

On the question you ask depends the answer you get. If the problem is conceived of merely as a matter of arithmetic you get an arithmetical answer. If the problem is put in the context of the industry to which it relates, and meaning is derived from an understanding of the problems of the industrial community of which this is just one aspect, a totally different set of considerations must be respected. The defendants derived their rights from the entire agreement and not from a part mutilated by isolation. If the parties had written out with unambiguous explicitness that the extra wage in the scheduled periods is to be deemed a deterrent against work during those periods and is not to be deemed a basis for calculating time and a half after the forty hours, I cannot believe that this Court would say that such an agreement, made in palpable good faith, is outlawed by the Fair Labor Standards Act.

How is compensation for services above the limits set by the Act to be reckoned? The standard for compensation could be determined (1) by specific statutory terms; (2) by collective agreement; or (3) by judicial construction in default of either.

Congress could have laid down a hard and fast rule, could have expressed a purely arithmetic formula. It could have said that the rate on which time and a half

is to be reckoned is to be found by dividing the total wage by the hours worked. It would not even have been necessary to spell all this out. Congress could have conveyed its thought by using the phrase "average" instead of "regular." And where we have nothing else to go on, except the total wage and the hours, it is reasonable enough thus to ascertain the regular rate. But when parties to a complicated industrial agreement, with full understanding of details not peculiarly within the competence of judges, indicate what the regular rate is for purposes of contingencies and adjustments satisfied otherwise than by a purely arithmetic determination of the rate of wages, nothing in the history of the law or its language precludes such desirable consensual arrangements, provided, of course, that the parties deal at arms length, and that the defined "regular" rate is not an artifice for circumventing the plain commands of the law. Such an artifice would obviously not be used in a contract made by workers in their own interests represented by a union strong enough to pursue those interests. Regularity in this context implies of course a controlling norm for determining wages which, though agreed upon between the parties, is consistent with, and not hostile to, the underlying aims of the overtime provision of the Fair Labor Standards Act. Discouragement of overwork and of underemployment are the aims. The longshoremen's collective agreement serves the same purpose as does the statute.

The Fair Labor Standards Act is not a legislative code for the government of industry. It sets a few minimum standards, leaving the main features in the employment relation for voluntary arrangement between the parties. Where strong unions exist relatively little of the employment relation was to be enforced by law. Most of it was left to be regulated by free choice and usage as expressed and understood by the unions and employers. Congress did not provide for increase in basic rates except to the

limited extent of establishing minimum wages. The inclusion of such minimum wages is in itself a recognition by Congress of the distinction between what it sought to change and what it sought to use only as the basis for the computation of an overtime percentage.

The claim of the few members in opposition to the union is predicated upon an amount superadded for reasons peculiar to the stevedoring industry to the wage which the parties to the agreement in perfect good faith established as the regular rate. The union members secured this extra wage as part of the entire scheme of the collective agreement.[7] This premium is not to be detached from the scheme as though it were a rate fixed by law as a basis for calculating the statute's narrowly limited overtime provision. So long as its minimum wage provisions were complied with, the statute did not seek to change the true basic or "regular" rate of pay in any industry, from which rate all statutory overtime is to be computed. There is no justification for interpreting the statutory term as including elements clearly understood in the industry to be as foreign to the "regular rate" as any strictly overtime rates. Here the extra wage is the industry's overtime rate for work which might not be within the overtime period of the Fair Labor Standards Act, but was within the schedule of the collective agreement for extra wages, not because the work was overtime in the ordinary industrial sense but because it was at periods during which all work was sought to be discouraged by making it costly. Because the union secured for its men an extra wage even for not more than forty working hours, the scope of the Fair Labor Standards Act

[7] Cf. Lord Stowell, in *The Neptune*, 1 Hagg. Adm. 227, 232: ". . . the natural and legal parents of wages are the mariner's contract, and the performance of the service covenanted therein; they in fact generate the title to wages."

as to overtime is not enlarged. Only for a work-week longer than forty hours is an employee to be paid one and a half times "the regular rate," and nothing in the Act precludes agreement between the parties as to what the regular rate should be, provided such agreement is reached in good faith and as a fair bargain. The presupposition of the Act was that voluntary arrangements through collective bargaining should cover an area much wider, and economically more advantageous, than the minimum standards fixed by the Act. The traditional process of collective bargaining was not to be disturbed where it existed. It was to be extended by advancing the economic position of workers in non-unionized industries and in industries where unions were weak, by furthering equality in bargaining power. It certainly was not the purpose of the Act to permit the weakening of a strong union by eviscerating judicial construction of the terms of a collective agreement contrary to the meaning under which the industry had long been operating and for which the union is earnestly contending.

There can be no quarrel with the generality that merely because the conditions of employment are arrived at through collective bargaining an arrangement which violates the statute need not be upheld. But this does not mean that in determining whether the contractual designation of certain hours as "basic" is honest and fair, we cannot consider the fact that the contract was one entered into by a powerful union, familiar with the needs of its members and the peculiar conditions of the industry, and fully equipped to safeguard its membership. To view such a contract with a hostile eye is scarcely to carry out the purpose of Congress in enacting the Fair Labor Standards Act.

This Court has sustained the power of "employer and employee . . . to establish [the] regular rate at any

point and in any manner they see fit," *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424, provided that the regular rate is not computed "in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42. If we were confronted with an agreement which did not reflect the true practice in the industry, if despite the designation of certain hours as "basic" and others as "overtime," the distinction was not actually observed, but work was done at all times indiscriminately, so that what the contract designated as "overtime" pay was in reality a "shift differential," designed to induce employees to work at less pleasant hours, rather than to deter employers from carrying on at such hours, the labels attached by the parties to the various periods of work would not be allowed to conceal the true facts. We have again and again pierced through such deceptive forms. See, *e. g.*, *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427; *149 Madison Ave. Corp.* v. *Asselta*, 331 U. S. 199. But here there is no suggestion that the agreement mislabeled the true circumstances of the employment relationship. And it is significant that in no case in which we found that the terms used had distorted the true facts did a union which had made the contract appear to defend it.

The fact that some work was done at odd hours does not misrepresent the regular situation, provided that such work was exceptional and was restricted in frequency by the overtime provisions of the agreement, so that what the agreement treated as regular and what as exceptional were truly just that. We turn then to the actual experience, in representative periods, of the Port of New York longshoremen. The stipulations, exhibits, and findings of the District Court, all demonstrate the exceptional

nature of "overtime" work.[8] It is also apparent that such night work as was done was usually done in addition to, rather than instead of, daytime work. The increased compensation for such work therefore served principally to achieve the same result as did the statute—namely, to afford a higher rate of compensation for long hours. In peacetime, night work was extremely rare for anyone as a recurring experience, and even during the exigencies of war only a small minority was principally so occupied.

The accuracy of the designation of one period or amount of work as "basic" is not contradicted by the fact that some work may have been done at other times as well. The very reference in any collective agreement to overtime pay for unusual hours implies that some such work is anticipated. A protective tariff need not be so high as to exclude every last item. The statistics in the margin amply justify the trial judge's conclusion that the designations in the collective agreement were not unreal or artificial when the agreement was entered into, and did not become so even at the height of the abnormal wartime effort.

[8] The following figures were either stipulated by the parties, found as facts by the District Court and concurred in by the Circuit Court of Appeals and this Court, or computed from such statistics:

	1932–37, average	Oct. 24, 1938 (effective date of FLSA) to Aug. 31, 1939 (eve of war)	Apr. 1, 1944–Mar. 31, 1945 (height of wartime activity)
Work performed during straight time hours	79.93%	75.03%	54.5%
Night work	15.13%	17.89%	20.5%
Weekend work	4.94%	7.08%	25.0%
Total night work by men who had worked during same day	13.2%	23.29%	44.5%
Ditto by those who had not	86.8%	76.71%	55.5%
Total man-hours, consisting of night work by those who had not worked during same day	2.57%	4.17%	11.1%
Concentration of man-hours, straight time over overtime	11.22	8.47	3.[illegible]

Of course, even if most of the work of longshoremen was performed during "straight-time" hours, if the 50% increment for work at other times was not a true overtime payment, but a shift differential, this higher rate of pay would have to be taken into account in establishing the "regular rate" of the respondents. But the District Court found that this premium constituted true overtime. As that court stated (Finding 28), a shift differential

> "is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts,"

while a true overtime premium

> "is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50% of the normal rate."

These findings of the District Court are amply supported by the testimony and by industrial statistics. See 65 Monthly Labor Review 183–85; Wage Structure: Machinery (Bureau of Labor Statistics 1945) p. 21; *id.* (1946) p. 38; Wage Structure: Foundries (Bureau of Labor Statistics 1945) Tables 32, 33; *id.* (1946) pp. 44–45. And compare the Directives of the Economic Stabilization Director dated March 8, 1945, and April 24, 1945, limiting the shift differentials which the National War Labor Board could approve to four cents per hour for the second shift and six or eight cents per hour for the third. CCH Labor Law Service, vol. 1A, ¶¶ 10,034.11, 10,462. Apply-

ing the test based on Finding 28, and finding also that the differential had in fact served to deter night and week-end work, the District Court held that the fifty per cent increment was true overtime and not a shift differential.

The Court purports to accept the findings of the District Court, and yet it concludes that the District Court erred in finding that the fifty per cent was by way of overtime and not a shift differential. The District Court, to be sure, did not explicitly state that the premium was not a shift differential in one of its formal Findings of Fact. It did so state, however, in its opinion and this conclusion depended on the statements quoted above from Finding 28 as to the characteristics indicative of true overtime and shift differentials. I fail to see how this Court can accept Finding 28 and reject the conclusion that the contractual "overtime" was not a shift differential.

Findings of lower courts are to be disregarded only if not substantiated by the evidence. Here, the evidence supporting the finding was impressive, and yet the Court strains to overturn it to reach a result not urged as socially desirable but only as demanded by legal dialectic.*

The Court holds that even if the collective agreement accurately designated the regular and overtime work of the generality of longshoremen, it cannot apply to the respondents, because of their particular working hours for a stretch of the wartime period here in controversy.

---

*That the hours designated by the agreement as "overtime" were regarded by the union as *excessive* hours, rather than merely as *unpleasant* hours, may also be deduced from the fact that they included much weekday time in which there was ample daylight during a large part of the year, and were not confined to nights and week-ends. Another indication of the same thing is the fact that the history of the union agreements for New York longshoremen reveals a succession of reductions of the total number of "straight time" hours parallel to the reduction of the usual weekly working hours during the same period throughout American industry.

This contention expresses an attitude toward the process of collective bargaining which, if accepted, would undermine its efficacy. It subjects the collective agreement to the hazards of self-serving individualism, which must inevitably weaken the force of such agreements for improving the conditions of labor and forwarding industrial peace. Here, the very increased rates of pay which the respondents received for exceptional night and weekend work was the result of the contract which they now seek to disavow.

Collective bargaining between powerful combinations of employers and employees in an entire industry, each group conscious of what it seeks and having not merely responsibility for its membership but resourceful experience in discharging it, is a form of industrial government whereby self-imposed law supplants force. Cf. Feis, The Settlement of Wage Disputes (1921) c. II. This is an accurate description of the process by which the stevedoring industry has served the greatest port in the United States. Yet the Court rejects the meaning which the parties to the agreement have given it and says it means what the parties reject. Often, too often, industrial strife is engendered by conflicting views between employers and employees as to the meaning of a collective agreement. Here the industry as an entirety—the union and the employers' association—is in complete accord on the meaning of the terms under which the industry has lived for thirty years and under which alone, the parties to the agreement insist, they can continue to live peacefully. But a few members of the union assert an interest different from that of their fellows—some thirty thousand—and urge their private meaning even though this carries potential dislocation to the very agreement to which they appeal for their rights. Unless it be judicially established that union officers do not know their responsibility or have betrayed it, so that what appears to be a contract on behalf of their men is mere pretense

in that it does not express the true interests of the union as an entirety, this Court had better let the union speak for its members and represent their welfare, instead of reconstructing, and thereby jeopardizing, arrangements under which the union has lived and thrived and by which it wishes to abide.[10]

Collective agreements play too valuable a part in the government of industrial relationships to be cast aside at the whim of a few union members who seek to retain their benefits but wish to disavow what they regard as their burdens. Unless the collective agreement is held to determine the incidents of the employment of the entirety for whom it was secured, it ceases to play its great role as an instrument of industrial democracy. Cf. Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572; Wolf, *The Enforcement of Collective Labor Agreements: A Proposal*, 5 Law & Contemp. Prob. 273; Hamilton, *Collective Bargaining*, 3 Encyc. Soc. Sci. 628, 630.

But furthermore, as I read the Court's opinion, it is not limited in application to those employees most or all of whose work was done at night, but extends equally to those who worked chiefly during the "basic working week," but also did a few hours of work at other times. Even where a longshoreman worked precisely forty hours of "straight time," followed by a few hours of "overtime" in the same week, payment of the appropriate wages as

---

[10] Of course, if it can be shown that particular employees—for reasons of color, lack of seniority, or anything else—were not fairly or properly represented in the collective bargaining agreement, and were discriminated against and forced into a less desirable class of work, not because of accident or their own desire but because of the deliberate policy of the employers, the union, or both, we cannot treat the agreement made for the generality of longshoremen as binding upon them as well. See *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. The respondents' claim was not based upon any such allegation.

determined by the collective agreement would not satisfy the Court's test that only such extra pay as is given "for work because of previous work for a *specified* number of hours in the workday or workweek" [11] can be regarded as true overtime pay. To require specification in an industry where the only thing certain is uncertainty is to command the impossible. There is no justification for such a test in the statute, its history, industrial practice, judicial decision, or administrative interpretations.[12]

In short, this is not a decision that where the predominant work of an employee is paid for at "overtime" rates, such rates enter into computation of the "regular rate," but rather that where the conditions in an industry are such that the number of "straight time" hours cannot be precisely predicted in advance, an arrangement for time and a half for all other hours cannot be legal, regardless of how unusual work outside of the "straight time" hours may be.

But whether or not the Court means to go as far as it seems to go, and even if its holding is later limited to the narrow situation now before us, I cannot agree with its conclusion. It seems to me that the "regular rate" of pay for Port of New York longshoremen was the "straight time" scale provided for by the union contract, and that this was true for the whole union, including the individual respondents. Far from receiving less overtime than the statute required, the respondents were, through the agreement, the recipients of much more. To call their demand one for "overtime pyramided on overtime" is not to use a clever catchphrase, but to describe fairly the true nature of their claim.

I would reinstate the judgments of the District Court.

---

[11] Italics supplied.

[12] The Interpretations of the Wage-Hour Administrator pertinent to this case are conflicting and inconclusive. Citation of the most relevant should suffice. Cf. §§ 69, 70 (A) (6), Interpretative Bulletin No. 4, Wage and Hour Division, Department of Labor.